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LIST OF ABBREVIATIONS

AFORE	Administradora de Fondos para el Retiro (Retirement Fund Administrator)
COFEPRIS	Comisión Federal para la Protección contra Riesgos Sanitarios
CONEVAL	Consejo Nacional de Evaluación de la Política de Desarrollo Social
DOF	Diario Oficial de la Federación
ENOE	Encuesta Nacional de Ocupación y Empleo
EUA	Estados Unidos de América (USA)
IMSS	Instituto Mexicano del Seguro Social
INEGI	Instituto Nacional de Estadística y Geografía
ISSSTE	Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado
MCS	Módulo de Condiciones Socioeconómicas
SAR	Sistema de Ahorro para el Retiro
SCJN	Suprema Corte de Justicia de la Nación
SRE	Secretaría de Relaciones Exteriores
SUS	Sistema Universal de Salud
t.	Tomo (volume)
UK	United Kingdom

INTRODUCTION

The enjoyment of social security not only allows citizens to thrive in an inhabitable society, but it also stimulates social inclusion and makes it possible for all to take part in a country's social and political events.

While in principle some law reforms do not have direct bearing on the granting of social rights, they may indirectly come into play in the advances or regressions made in social security. The most relevant of these law reforms adopted in 2016 include:

- The reform of family law and same-sex marriage. This comprehensive initiative aimed at reforming various laws on the following issues: marriage for all including same-sex couples, equal conditions for adoption, the guarantee of gender identity and the possibility of being allowed divorce without having to express the cause.

These reforms were to grant the right to benefits regarding taxes, social welfare benefits, survivors' benefits upon the death of a spouse, benefits regarding property, medical decisions, decisions on migration issues in the case of foreigners, and even social security benefits.

Unfortunately, social pressure was too strong and Congress had to downgrade the reform so as to grant each local congress the authority to legislate on the issue. By the end of the year, only 12 states had endorsed the right to marriage for same-sex couples.

- Another important reform was the General Law for the National Anti-Corruption System (Ley General del Sistema Nacional Anticorrupción) approved by Congress on 18 July 2016. This law is part of a package of legislative reforms including: the General Law of Administrative Liabilities (Ley General de Responsabilidades Administrativas), the Law on Supervision and Accountability of the Federation (Ley de Fiscalización y Rendición de Cuentas de la Federación), the Tax Coordination Law (Ley de Coordinación Fiscal), the General Law on Governmental Accounting (Ley General de Contabilidad Gubernamental), the Organic Law of the Federal Attorney General's Office (Ley Orgánica de la Procuraduría General de la República), the Organic Law of the Federal Public Administration (Ley Orgánica de la Administración Pública Federal), and the Federal Criminal Code (Código Penal Federal). The main objective of these reforms is to coordinate social actors and authorities on different levels of government in order to prevent, investigate and punish corruption nationwide.

This comprehensive reform acknowledges the advances made in anti-corruption legislation, which is expected to also bear fruit in the granting of benefits arising from social rights. To this effect, Commissioner Oscar Guerra of the National Institute for Transparency, Access to Information and Protection of Personal Data (Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales) points out that "According to the World Bank, the Bank of Mexico (Banco de México) and Forbes, corruption costs Mexico 9 percentage points of its GDP. As a reference, according to the 2014 Federal Treasury Public Accounts (Cuenta de la Hacienda Pública Federal), 3.5% of the GDP was spent on education that year, 2.6% on health care, and 3.5% on social protection (pension payments). In other words, the

cost of corruption is almost higher than the expenditure assigned for guaranteeing the provision of education and health care to the Mexican people."¹

In the legislative field, the reforms announced already for 2014 and 2015 (see Social Law Reports 3/2015 and 3/2016) are still pending, in particular the adoption of the draft legislation on unemployment insurance, universal pension and reforms to the ISSSTE² Law.

1. CURRENT ECONOMIC, POLITICAL AND SOCIAL SITUATION

Among the socioeconomic data that presented changes from 2015 to 2016, the following are worth mentioning:

a) Economy

Economic growth remained steady at 2.3% according to preliminary figures from the National Institute for Statistics and Geography (Instituto Nacional de Estadística y Geografía – INEGI).³

Once again, remittances reached a historical peak, accruing 26.97 billion USD⁴ with a +8.8% growth compared to the previous year.⁵ Among other factors, this increase is due to the precautions Mexicans have taken in view of the new US president's intention of imposing taxes on remittances.

b) Social Security

The budget allocated to social security rose from \$ 501,627,340,000 in 2015 to \$ 553,686,745,568 in 2016.⁶ It should be noted that this item does not include the budget designated for the People's Health Insurance (Seguro Popular de Salud) and for extra expenses for social security institutes, such as the construction of 4 large hospitals in the country.

¹ Guerra Ford, Oscar Mauricio, Comisionado del Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales, Propuestas de contenido para las leyes secundarias de la reforma anticorrupción, Mexico, INAI, 2016, p. 1, at http://inicio.ifai.org.mx/presentaciones/MensajeSenadoAnticorrupcion_22Feb2016_1.pdf (accessed on: 6 February 2017).

² This is the acronym for the Institute for Security and Social Services for State Workers.

³ Instituto Nacional de Estadística y Geografía, "Estimación Oportuna del PIB trimestral al cuarto trimestre de 2016", PIB y Cuentas Nacionales, Mexico, INEGI at <http://www.inegi.org.mx/est/contenidos/proyectos/cn/pibo/default.aspx> (accessed on: 5 February 2017).

⁴ The exchange rate used for this report is \$ 20.34 Mexican pesos = 1 USD, data from the Bank of Mexico on 6 February 2017, available at Banco de México, Tipo de cambio, Mexico, Banco de México, 2017, at <http://www.banxico.org.mx/repositorios/dgobc-web/sisfix/fix48.html> (accessed on: 6 February 2017).

⁵ Banco Bilbao Vizcaya Argentaria, "En 2016 las remesas alcanzaron su máximo histórico (26,970 md)", Observatorio, México, BBVA Research, 2017, available at https://www.bbva.com/publicaciones/mexico-en-2016-las-remesas-alcanzan-su-maximo-historico-26-970-md/?utm_source=instant&utm_medium=enlace%20publicación&utm_campaign=20170201&utm_content=México%20%7C%20En%202016%20las%20remesas%20alcanzaron%20su%20máximo%20histórico%20%2826%20970%20md%29 (accessed on: 3 February 2017).

⁶ Diario Oficial de la Federación (Federal Official Gazette), Presupuesto de Egresos de la Federación para el año 2016, DOF, available at http://inicio.ifai.org.mx/MarcoNormativoDocumentos/PEF_2016.pdf (accessed on: 5 February 2017).

c) Labour

In terms of labour, the rate of unemployment went down and more than 1 million formal jobs were created.⁷

Of the new jobs recorded, more than 732,000 were enrolled in the IMSS⁸, which is equal to an annual rate of 4.1%. Of this increase, 89% (649,761) are permanent positions. This represents the highest growth of this type of employment reported since 1997.⁹

Informal employment went down by one percentage point, compared to the same quarter in the previous year. The third quarter of 2016 saw a rate of 57% of employed population; that is, 30 million people had jobs that did not provide them with any type of contract or job benefits.¹⁰

In contrast, according to the National Survey of Occupation and Employment (Encuesta Nacional de Ocupación y Empleo – ENOE),¹¹ the labour participation of minors between the ages of 12 and 17 increased despite the 2014 constitutional reform and the 2015 Federal Labour Law, which prohibited the work of minors under 15 and established fines against employers who hire them.

An extremely important labour reform that will greatly affect every branch of social security has been adopted: the increase of the minimum wage. The debate took place in 2016, but the increase has applied as of 2017. For 2017, the general minimum wage has been set at \$ 80.04 Mexican pesos a day¹² (3.93 USD) for an 8-hour working day. This is a historical increase of 9.85% as compared to 2016.

d) Poverty

No annual data on poverty were issued this year due to a dissent between institutions.

According to the General Social Development Act (Ley General de Desarrollo Social), the National Council for the Evaluation of Social Development (Consejo Nacional de Evaluación de la Política de

⁷ Presidencia de la República, "Más de un millón de empleos formales en 2016", Blog, México, Presidencia de la República, 2016, available at <https://www.gob.mx/presidencia/articulos/mas-de-1-000-000-de-empleos-formales-en-2016> (accessed on: 3 February 2017).

⁸ This is the acronym for the Mexican Social Security Institute.

⁹ Instituto Mexicano del Seguro Social, "Puestos de trabajo afiliados al Instituto Mexicano del Seguro Social (IMSS) al mes de diciembre de 2016", Prensa, Mexico, IMSS, 2017, available at <http://www.imss.gob.mx/prensa/archivo/201701/011> (accessed on: 16 January 2017).

¹⁰ Instituto Nacional de Estadística y Geografía, "Tasa de informalidad laboral: 1. Series desestacionalizadas", Empleo y ocupación, México, INEGI, available at <http://www.beta.inegi.org.mx/temas/empleo/> (accessed on: 15 February 2017).

¹¹ Consejo Nacional de Evaluación de la Política de Desarrollo Social, "Participación laboral por grupos de edad", ITLP-IS, Otros indicadores Económicos Sociales de Corto Plazo, Mexico, CONEVAL, 2016, p. 23, available at http://www.coneval.org.mx/Medicion/Documents/ITLP-IS/2016/2t2016/ITLP_IS-Indicadores-de-corto-plazo-agosto-2016.pdf, (accessed on: 7 February 2017).

¹² Diario Oficial de la Federación, Resolución del H. Consejo de Representantes de la Comisión Nacional de los Salarios Mínimos que fija los salarios mínimos general y profesionales vigentes a partir del 1o. de enero de 2017, Mexico, DOF, 2016, available at http://www.dof.gob.mx/nota_detalle.php?codigo=5466000&fecha=19/12/2016, (accessed on: 13 January 2017).

Desarrollo Social – CONEVAL) has the power to measure poverty in Mexico at national, state and municipal levels. Meanwhile, the National Institute for Statistics and Geography (Instituto Nacional de Estadística y Geografía – INEGI) is the institution in charge of providing household economic data that contribute to measuring poverty. This information is gathered every year by the Socioeconomic Conditions Unit (Módulo de Condiciones Socioeconómicas – MCS).¹³

This means that the INEGI and the CONEVAL work together to provide annual figures on poverty levels in the country.

In July 2016, the INEGI issued the MCS results for 2015. However, the results showed an alteration in the way in which the household income was captured. Figures displayed a real increase of 33.6% in the income of the poorest households in one single year, which is not consistent with the tendency indicated by other INEGI instruments and with other economic variables.¹⁴

The INEGI reported that the change was due to the "underestimation of income since the informers tend to declare less than what they actually earn,"¹⁵ and that this information is validated by studies on international comparisons. It should be noted that only one study by OECD authors was cited in its press release.¹⁶

The change consisted in holding a second interview, which was only applied to households with the lowest levels of income. However, the methodology only shows that the second monitoring interview only centres on the reasons why the household did not respond to certain questions.¹⁷

In view of this, the CONEVAL held that it had not been consulted about this modification at any time and that the modification did not follow a transparent, planned process. The institution also pointed out the lack of public and technical documents to justify it. This would bring about a rupture in the

¹³ Diario Oficial de la Federación, Lineamientos y criterios generales para la definición, identificación y medición de la pobreza, México, DOF, 2010, available at http://www.coneval.org.mx/rw/resource/coneval/med_pobreza/DiarioOficial/DOF_lineamientos_pobrezaCON EVAL_16062010.pdf (accessed on: 16 February 2017).

¹⁴ Consejo Nacional de Evaluación de la Política de Desarrollo Social, "Posicionamiento de CONEVAL a los cambios realizados por el INEGI en la captación de los ingresos de los hogares", Comunicado de prensa, No. 003, Mexico, CONEVAL, 2016, available at <http://www.coneval.org.mx/SalaPrensa/Comunicadosprensa/Documents/Comunicado-de-prensa-003-CONEVAL.pdf> (accessed on: 14 February 2017).

¹⁵ Instituto Nacional de Estadística y Geografía, "El INEGI mejora la captación del ingreso de los hogares", Boletín de prensa, Núm. 286/16, Mexico, INEGI, 2016, available at http://www.inegi.org.mx/saladeprensa/boletines/2016/especiales/especiales2016_07_03.pdf (accessed on: 14 February 2017).

¹⁶ Fesseau, Maryse et al., A Cross-Country Comparison of Household Income, Consumption and Wealth Between Micro Sources and National Accounts Aggregates, OECD, 2013, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=STD/CSTAT/WPNA\(2013\)9/RD&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=STD/CSTAT/WPNA(2013)9/RD&docLanguage=En) (accessed on: 14 February 2017).

¹⁷ Instituto Nacional de Estadística y Geografía, "El INEGI mejora la captación..." cit. supra (footnote 15).

historical evolution of measuring poverty that had been reported since 2008 and therefore, the annual poverty indicator was not presented in 2016.¹⁸

2. EVOLUTION OF SOCIAL PROTECTION SCHEMES

2.1. Old Age

"The Mexican pension system has four components: i) the federal and state non-contributory (first-tier) pension schemes, (ii) the mandatory Retirement Savings System (Sistema de Ahorro para el Retiro, SAR), (iii) special pension schemes for certain public-sector employees and state universities, and (iv) individual and occupational voluntary pension plans."¹⁹

The main component of the Mexican pension system is the SAR system based on funded individual accounts introduced in 1997 for private-sector workers and in 2007 for public-sector workers.

A few exceptions remained, such as the pension system for members of the Mexican armed forces, the Supreme Court ministers, ex-presidents and some other public servants.

The most important nationwide non-contributory scheme in Mexico, called the "pension for the elderly" (*pensión para adultos mayores*) is funded by the federal budget. However, it is a cash benefit granted through a social assistance programme and not a pension fund.

In this context, the following advances are reported:

a) Eligibility criteria for the mandatory Retirement Savings System (SAR)

In 2016, no legislative reforms of the mandatory system were enacted, but the Supreme Court (SC) decided two cases regarding the eligibility criteria to access benefits under the Retirement Savings System. The first dispute²⁰ concerned the right of foreign workers to have their savings transferred out if they exit the Mexican labour market to return to their home country, whereas under social security legislation a worker may access the savings for retirement not before reaching the age of 60. Two lower courts had denied the claim of a 35-year-old British citizen who wished to re-migrate to the UK but was impeded to transfer her SAR savings because the age requirement was not met. Based on ILO Convention No. 118, the Supreme Court reversed the sentences of the lower courts and recognized the right of foreign workers to access and transfer savings before having attained the regular age limit. The decision was based on the following reasoning:

- The interpretation of the law based on the principle of *in dubio pro operario* (in case of doubt, it will be settled according to what most benefits the worker);

¹⁸ Consejo Nacional de Evaluación de la Política de Desarrollo Social, "Posicionamiento de CONEVAL...", cit. supra (footnote 14).

¹⁹ OECD, *OECD Reviews of Pension Systems Mexico*, 2015, p. 26.

²⁰ SISTEMA DE AHORRO PARA EL RETIRO, Tesis: I.7o.T.17 L, *Semanario Judicial de la Federación y su Gaceta*, Décima Época, t. III, April 2016, p. 2554.

- The solution of conflicts on granting social security benefits based on an international convention, without the need of an international agreement between countries; and on
- Granting the right to a foreign citizen, by attributing a higher legal rank to an international instrument superseding domestic social security legislation. This is a landmark ruling since the Mexican Constitution was reformed in 2011 to situate international treaties on human rights, and on social security, for the first time on the same hierarchical level as the Constitution itself.

It should be noted that foreigners who want to claim their savings must file a labour law suit before a Federal Conciliation and Arbitration Board. Since reforms to the law have yet to address this issue, the administrative authority (IMSS) will continue to apply the legal provisions currently in force.²¹

The second case concerned the eligibility criteria to access the pension for severance in old age (*pensión de cesantía en edad avanzada*), a special form of early pension for the unemployed at older ages, and the question of acquired rights vs. expectations.²²

A citizen demands that the IMSS grant a pension for severance in old age on having met the requirements of age and number of contributions. However, the pension is denied to him on the grounds that Article 182 of the Social Security Law stipulates that those insured who are no longer affiliated to the compulsory IMSS system will conserve the acquired rights to pensions, but only for a period equal to a quarter of the time covered by his weekly contributions, as of the date of his leaving, whereas the claimant has been out of the mandatory system for 6 years.

The Collegiate Court ruled in favour of the IMSS and the judgement has since become consolidated labour case law.

It is important to note that as long as the requirements established by law to enjoy a pension are not met, the rights workers generate are not acquired rights, but are only expectations of rights. Rights are acquired the moment the requirements are fully met to be able to enjoy this right called a pension.

One of the main reasons underlying Art. 182 – although the Court does not expressly mention it in this judgement – is pension financing, as this provision obliges many workers to pay contributions for

²¹ In Mexico, case law is created by the Supreme Court of Justice sitting en banc, the Chambers of this court, Collegiate Circuit Courts and the Circuit Court sitting en banc.

The ways of creating case law are by reiteration, by thesis contradiction and by substitution. The first is the most common as it consists of upholding the same criterion for five consecutive rulings for one against it. Generally speaking, so as not to enter into too much detail, the application of case law is mandatory for judicial bodies ranked lower than the body that issued it. The judgements pronounced in amparo trials shall only deal with the claimants – persons – who so request it, as this type of trial is limited to safeguard and protect the claimants, where warranted. Even then, when amparo trials are conducted before District Judges – an indirect amparo – the unconstitutionality of a provision is resolved by reiteration. With the exception of tax law, it is possible, on meeting certain requirements, for the SCJN to make a general declaration of unconstitutionality, with which said provision can no longer be applied to any person in the country.

²² PENSIÓN DE CESANTÍA EN EDAD AVANZADA. Tesis: PC.I.L. J/26 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. III, November 2016, p. 1882.

one or more years to re-activate their rights, without this allowing them to obtain a higher pension amount.

This is likewise detrimental for workers because it is not easy to obtain a formal job with social insurance at the age of 60. Thus, the right to a pension is permanently lost and they are only left with the right to withdraw the resources accrued from 1997 to date from their individual accounts, without taking into account the time during which contributions were made before that year, and without the right to health insurance in either case.

b) Enhancing voluntary savings

In late 2016, the National Retirement Savings System Commission (Comisión Nacional del Sistema de Ahorro para el Retiro) reported that it had attained the highest voluntary savings rates at Retirement Fund Administrators (Administradoras de Fondos para el Retiro – AFORE) in 20 years.²³

In Mexico, each formal worker has an individual account at an AFORE. Each account, which is basically a savings account, is divided into 3 sub-accounts: a retirement, advanced-age suspension and old-age fund; a housing fund account, and voluntary contributions (Art. 159 Social Security Law).

Both the employer and the worker can deposit into the voluntary contribution sub-account so as to increase the amount of pension to receive at the end of the workers professional life.

As a result of a CONSAR media campaign, voluntary savings reached a record figure (\$ 1.47 billion USD)²⁴ in 2016, with a 30% growth standing at \$ 8,588.3 million pesos, that is, more than 420 million USD.

However, this amount does not only consist of voluntary savings; it also includes the money from the individual accounts of workers who upon reaching the age of 65 did not meet the requirements of 1250 weeks of contributions for the right to an old-age pension.

In this case, the law states that the individual account holder can ask the AFORE to give him the full amount saved in all his accounts.

Despite the fact that this right is recognized in the Social Security Law, the beneficiaries' lack of knowledge of their rights has hindered them from claiming the corresponding amounts, and now the Federal Government is in charge of delivering these resources.

In total, there are 54 million pesos of pension savings (\$ 2,654,867.26 USD), which are found in the hands of 11 Retirement Fund Administrators (Administradoras de Ahorro para el Retiro – AFORES).

²³ Comisión Nacional del Sistema de Ahorro para el Retiro, "2016, Año record de ahorro voluntario en el SAR", *Boletín de prensa*, CONSAR, Mexico, 2017, p. 1, available at <http://www.gob.mx/cms/uploads/attachment/file/181912/BP-04-2016.pdf>, (accessed on: 6 February 2017).

²⁴ Idem.

2.2. Survivors

No legislative reforms were made on issues regarding survivors. However, the Supreme Court did establish some interesting criteria on the application and interpretation of the provision of survivors pensions according to the Social Security Law.²⁵

The parents of an IMSS worker who died sued the Institute itself, both in its function as an employer and as a social security institute, to be granted survivors pension, according to the Collective Labour Contract that applied to their daughter and under which her daughter had named them as her sole beneficiaries.

However, the Court granted the widower's pension to the surviving spouse, and the other financial benefits were divided equally among the parents and the widower, as stipulated by law.

This case is important in that, although the Court only argues about compliance with the law, it recognizes that Social Security Law should be strictly applied (*stricto jure*) and only in the case of normative gaps or ambiguity can labour or civil regulations be applied to supplement social security law, including the provisions established in collective labour agreements or naming heirs in civil matters.

2.3. Health Care Provision and the Right to Health

a) SCJN Conceptualisation of the Individual and Social Dimension of the Right to Health:²⁶

The controversial case on the use of marijuana led the Court to establish an important conceptualisation of the right to health in 2016.

In 2013, the Federal Commission for Protection against Sanitary Risks (Protección contra Riesgos Sanitarios – COFEPRIS) denied the Mexican Society for Responsible and Tolerant Self-Consumption (Sociedad Mexicana de Autoconsumo Responsable y Tolerante, A.C. – SMART) authorization for the personal and periodic use of the cannabis drug for purely recreational use. This conflict was brought before the Supreme Court of Justice, which for the first time in Mexico authorized the use of marijuana without requesting any link to therapeutic use.

Therefore, the Court acknowledged:

1. to protect the right to freedom, even when using drugs that may be harmful to health, establishing an individual dimension of the right to health, made up of a person's physical, mental, economic and social condition;
2. to expand the concept of the right to health by determining that it also includes the social sphere, establishing general well-being as bound to the right to physical and psychological integrity, and

²⁵ PLIEGO TESTAMENTARIO SINDICAL, Tesis: VII.2o.T.49 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. IV, June 2016, p. 2958.

²⁶ DERECHO A LA PROTECCIÓN DE LA SALUD. DIMENSIONES INDIVIDUAL Y SOCIAL, Tesis 1ª. CCLXII/2016, Semanario Judicial de la Federación y su Gaceta, Decima Época, t. II, November 2016, p. 896.

3. reiterated the state obligation to establish mechanisms that guarantee the right to collective health. Thus, it is obliging the state to establish policies that protect collective health, even if this includes the consumption of a drug like marijuana.

b) The Universal Health System (SUS)

One of the events that stands out was the signing of the National Agreement for the Universalization of Healthcare Services²⁷ between the Health Secretary, the IMSS Director and the ISSSTE Director in April 2016, in order to start transforming the Mexican health care system into the Universal Health System (Sistema Universal de Salud – SUS) and encourage the building of a homogeneous health care model with integrated and coordinated operations between the Ministry of Health, social security institutions and state health care service providers.

In 2016, the first phase consisted in the possibility of federal and state health care agencies exchanging patients within an initial framework of 100 interventions.

This agreement represents the inception of a much needed health reform that is also much feared by the insured population.

The positive aspect is that patients can now go to the IMSS or the ISSSTE, regardless of their affiliation, for a specific gamut of general ailments. This could be facilitated through the proper use of infrastructure between both institutions accounting for the fact that both have national coverage.

The negative aspect is that everything seems to suggest that it is the beginning of the much feared transition to a privatization of the healthcare management in Mexico– as had been extensively recommended by the OECD.²⁸ While it is pure speculation, the outlook is not very promising if one takes as a reference the results of the privatization of the pension system administration.

c) The Responsibilities of Public and Private Healthcare Institutions toward their Patients

In the Weekly Federal Court Report (Semana Judicial), the Supreme Court published its decisions on the obligations of public healthcare institutions towards their patients in order to ensure compliance with the right to health.

The first decision to be reported deals with an isolated thesis arising from an amparo in review, concerning the effective protection of the right to health.²⁹ Unfortunately, the parties have

²⁷ Secretaría de Salud, "Acuerdo Nacional hacia la Universalización de los Servicios de Salud", Documentos, México, Secretaría de Salud, 2016, available at https://www.gob.mx/cms/uploads/attachment/file/76997/ACUERDO_NACIONAL_FIRMADO_7_ABRIL_2016.pdf (accessed on: 10 January 2017).

²⁸ See Chap. 3 "Prestación de servicios de salud, definición de un paquete de beneficios equitativo y fortalecimiento de la atención primaria" in Organización para la Cooperación y el Desarrollo Económicos, Estudios sobre los sistemas de salud en México, OECD Publishing, París, 2016, available at <http://www.inep.org/images/2017/2017-pdf/2016-OECD-Reviews-of-Health-Systems-Mexico.pdf> (accessed on: 10 January 2017).

²⁹ INSTITUCIONES PÚBLICAS DE SALUD, Tesis: II.1o.25 A, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. IV, October 2016, p. 2941.

requested that the judgement not be made public. However, the extract published in the Weekly Federal Court Report shows the First Collegiate Circuit Court's interpretation of the indirect amparo dated 26 May 2016, which expands the responsibilities of public health institutions with a view to the health of their patients: When a person hospitalized in a public healthcare institution is about to be discharged, thus marking the end of the duties of the institution, the mere fact of having a family member or caregiver to take care of the patient is not enough since the fundamental legal issue is to know whether this third party possesses the sufficient capacity to handle the patient's needs (financial, assistance- and care-related, depending on the illness). In the understanding of the Court the effective protection of the human rights to health and social assistance established in Article 4 of the Constitution falls within the remit of the institution, which must continue to care for the patient, if the relative is not able to handle the patient's needs.

Furthermore, the Court issued two isolated theses on the same case concerning the conflict between a deceased patient's heirs and a private hospital: The right to informed consent³⁰ and informed consent in situations of emergency.³¹

In September 2006, the patient's family had sued the hospital through civil channels for reasons of medical negligence and the omission of informing both the patient and his family members about the patient's medical condition. After a sentence charging the hospital to pay for damages, both parties came before the Court, which ruled that there was no such medical negligence.

The most striking element of these isolated theses is that they establish the first legislative bases on the issue in view of the fact that current legislation on the matter is scarce and can be summarized as follows:

Every patient and his family members have the right to be informed of the patient's health status. This is based on every person's right to health, conscience, privacy and life, as well as the medical professional's obligation to provide this information and the necessary elements for appropriate and free decision-making regarding the patient's body and health.

When the patient is in a state of incapacity and the factual circumstances so allow, authorization for the corresponding treatment or procedure must mandatorily be obtained from the next-of-kin family member, guardian or legal representative.

If these persons do not happen to be in the hospital at the crucial time and/or the treatment or procedure for the patient's illness is urgent (a situation of emergency) so much so that waiting for the mentioned authorization would lead to a serious or irreversible effect on the patient's physical integrity, health or life, then said treatment or procedure can be performed upon the agreement of two physicians (in the event that both are physically in the place, since there are healthcare services in the country where a patient is not assigned two doctors) and under their most strict responsibility,

³⁰ CONSENTIMIENTO INFORMADO EN MATERIA MÉDICO-SANITARIA, Tesis: 1a. CXCVII/2016 (10a.) Semanario Judicial de la Federación y su Gaceta, Décima Época, t. I, July 2016, p. 314.

³¹ PRESTACIÓN DE SERVICIOS DE ATENCIÓN MÉDICA, Tesis: 1a. CCXXV/2016, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. I, September 2016, p. 507.

on the condition that the assessment of the case is recorded along with all the relevant information in the medical record.

d) Healthcare for Migrants

The Mexican Ministry of Foreign Affairs (Secretaría de Relaciones Exteriores – SRE) and the Mexican Social Security Institute (Instituto Mexicano del Seguro Social – IMSS) signed a collaboration agreement to simplify the procedures and services for Mexicans in the United States.³²

The main objective of this agreement is to work on mechanisms that make it possible to bring healthcare programs to the migrant population concentrated in the United States (the IMSS estimates there are 8.8 million Mexicans between the age of 18 and 64 in the United States that do not have any medical coverage).³³ In other words, consular offices in the United States provide information about the different insurance programmes and services available for the migrant population (IMSS PROSPERA in Tamaulipas and Baja California), and in particular for family members living in Mexico (family health insurance).

e) The Right to Health of Prison Inmates

One vulnerable group with very few expectations of access to social security is that of prison inmates.

Their vulnerability lies not only in their condition of being deprived of liberty for having committed a crime, but also in the little sympathy they receive from society and therefore from politicians that tend to focus their attention on other vulnerable social groups (translating into more votes), as in the case of the elderly or women. Thus, the right to health of inmates has often been overlooked. So much so that the Court took up the matter in 2016 and issued several isolated theses:

The first of several theses touches upon two prison inmates suffering from skin problems and the protection of the right to health at social readaptation centres.³⁴

The inmates received medical treatment without seeing any improvement. Consequently, they requested an amparo from a district judge, who deemed that they had received medical attention and therefore refused them an amparo. In the appeal, the Court ordered the amparo judge to call upon the responsible authority (Social Readaptation Centres) to verify the status of the inmates' health by performing the corresponding medical tests in order to ensure that they are given the medical care required for their specific health condition. The Court ruled that the inmates required

³² Instituto Mexicano del Seguro Social, "Firman la SRE y el IMSS convenio de colaboración para facilitar trámites y servicios a Mexicanos en EUA", Prensa, Mexico, IMSS, available 2016, at <http://www.imss.gob.mx/prensa/archivo/201612/236> (accessed on: 10 December 2016).

³³ Idem.

³⁴ DERECHO A LA SALUD DE LOS INTERNOS EN UN CENTRO FEDERAL DE READAPTACION SOCIAL, Tesis VII.2º P. J/2, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. III, febrero 2016, p. 1966. DERECHO A LA PROTECCIÓN DE LA SALUD, Tesis: I.8o.A.2, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. IV, septiembre de 2016, p. 2656 y DERECHO A LA SALUD, Tesis: I.8o.A.98 A, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. IV, September 2016, p. 2657.

specialized medical attention and not just sporadic medical attention. Hence, it was a violation of the right to health.

The thesis emphasizes that every person has the right to enjoy the recognized human rights, including the right to health, without any distinction towards claimants merely because they are in a social reintegration centre. Moreover, all public servants and individuals are obliged to recognize these rights. Subsequent judgements uphold the above criterion.

2.4. Maternity Benefits and Maternity Leave

In terms of maternity benefits, three developments stand out:

The first is the enactment of Mexican Official Standard NOM-007-SSA2-2016, which aims at establishing the minimum criteria for medical attention for women during pregnancy, the birth and the normal postpartum period, as well as for the newborn, and for the implementation of these criteria nationwide.

The new standard includes the following innovations:

- Clear definitions that serve as criteria for interpretation for the rest of the legislation that regulates aspects associated with maternity.
- Specific guidelines on prenatal check-ups (frequency, actions to be performed at each one, etc.); as well as on mandatory medical care for newborns.
- The employer's obligation to encourage exclusive breastfeeding.

The second modification refers to the proposal of changing the distribution of the days of maternity leave at the mother's request. Currently, the Mexican Constitution and labour and social security regulating laws establish fixed pre- and postnatal periods.

On 6 April 2016, the Social Security Commission unanimously endorsed a reform to Article 101 of the Social Security Law in order to modify the distribution of the days of maternity leave at the mother's request, but without changing the total number of days covered by this leave. This reform project is still pending.³⁵

Meanwhile, the IMSS is proceeding with the reform proposal and has implemented, as of 1 July, a new process to obtain maternity leave by issuing a single certificate of incapacity for work for up to 84 days, which covers both the prenatal period and the postnatal period. With this change, one to four weeks of the period prior to the birth can be transferred to after the birth. It is only necessary to

³⁵ Cámara de Diputados, "Aprueban en comisión posibilidad de modificar descanso por maternidad si la madre así lo solicita", Boletines, No. 1265, México, Cámara de Diputados, 2016, available at <http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Boletines/2016/Abril/06/1265-Aprueban-en-comision-posibilidad-de-modificar-descanso-por-maternidad-si-la-madre-asi-lo-solicita> (accessed on: 15 October 2016).

fill out a week transfer request (two originals), obtain the employer's permission and get authorization from the family doctor.³⁶

Lastly, the Decree Amending and Supplementing Various Provisions of the Regulation on Sanitary Control of Products and Services (Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Reglamento de Control Sanitario de Productos y Servicios)³⁷ was passed and entered into force on 12 February. In an effort to encourage breastfeeding, this decree includes the prohibition for healthcare establishments to promote the use of breast or human milk substitutes and regulates the free delivery of breast or human milk substitutes.

2.5. Industrial Accidents and Occupational Diseases

a) Reform Projects

In October 2016, the Table of Evaluation of Permanent Disabilities was updated to replace the table in Art. 513 and 514 of the Federal Labour Law (within the framework of the 2012 labour reform).

This table establishes the percentages applicable to each type of ailment caused by work-related accidents and illnesses. This instrument had not been updated since 1970, which is why the table is expected to be passed by the legislative branch.³⁸

b) Case Law

On matters of occupational risks, the Court confined itself to enforcing the law. On the one hand, the law is – unduly – not followed, sometimes out of ignorance on behalf of the employer or simply out of negligence, and this harms right holders. Such is the case with the isolated thesis in which the Court clearly established that in the case of a death due to an occupational risk, it is not necessary to demonstrate any seniority requirement to receive a survivor's pension. This rule does not apply in cases, however, where a worker dies in an accident not qualifying as an industrial accident or from a general illness: in such cases 150 weeks of contributions on the part of the worker prior to his death are needed in order for survivors to be entitled to a pension.³⁹

On the other hand, the thesis solved conflicts that arose from having two pension systems in a single institution at the same time, one based on the Law of 1973 for workers who started working before 1997, and one based on the Law of 1995, which entered in force in 1997.

³⁶ Instituto Mexicano del Seguro Social, Maternidad, Mexico, IMSS, available at <http://www.imss.gob.mx/maternidad> (accessed on: 15 October 2016).

³⁷ Diario Oficial de la Federación, Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Reglamento de Control Sanitario de Productos y Servicios, Mexico, DOF, 2016, at http://www.dof.gob.mx/nota_detalle.php?codigo=5425506&fecha=12/02/2016 (accessed on: 20 October 2016).

³⁸ Secretaría del Trabajo y Previsión Social, "Concluyen Tabla de Evaluación de Incapacidades Permanentes", Prensa, México, Secretaría del Trabajo y Previsión Social, 2016, available at <http://www.gob.mx/stps/prensa/concluyen-tabla-de-evaluacion-de-incapacidades-permanentes> (accessed on: 30 January 2017).

³⁹ PENSIÓN POR ASCENDENCIA, en Tesis: VII.2o.T.34 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. II, March 2016, p. 1748.

Thus, the Court interpreted the current law in force, specifying the benefits to which workers are entitled under each law.⁴⁰

2.6. Social Assistance (Minimum Income Support)

a) Legislative Reforms

The only reforms passed were those of Articles 10, Section XXI, and 14, Section III, of the Law on the Rights of Older Persons (Ley de los Derechos de las Personas Adultas Mayores). Accordingly, adult day centres have been established to offer healthcare, food, and cleaning services, as well as to promote culture and recreational opportunities for all older persons over 60. The intention is to foster development potentialities and achieve inclusion and social integration of this vulnerable group.⁴¹

b) Community Kitchens

The Mexican government implemented the "Community Kitchen" (Comedores comunitarios) programme and eliminated the "Food Assistance" programme through which cash benefits were given to poor families to compensate for insufficient income and provide access to food.

The "Community Kitchen" programme aims at guaranteeing access to quality food by preparing and distributing food at food assistance centres for people who otherwise would have no access to or possibility to cook food (e.g. poor people who live in areas priorly allotted to them by the government). The operational guidelines of this programme⁴² establish that people who go to the community kitchen are entitled to two portions of prepared food a day at the kitchen for up to five days a week. They also have the right to reserve and to privacy of their personal information,⁴³ which guarantees access for vulnerable persons, such as irregular migrants.

3. CHANGES IN SOCIAL ADMINISTRATION AND FINANCING

On 26 May 2016, the Congress established the Scientific and Medical Advisory Board (Consejo Asesor Científico y Médico) as the senior-level advisory body of the Institute for Security and Social Services for State Workers (Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado –

⁴⁰ INCAPACIDAD PERMANENTE TOTAL O PARCIAL, en Tesis: 2a./J. 169/2015, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. II, enero de 2016, p. 1186 y PENSIÓN POR INCAPACIDAD PERMANENTE, PARCIAL O TOTAL, en Tesis VII.2o.T.62. L, Semanario Judicial de la Federación y su Gaceta, Decima Época, t. III, July 2016, p. 2178.

⁴¹ Diario Oficial de la Federación, Decreto por el que se adiciona la fracción XXI al artículo 10 y la fracción III al artículo 14 de la Ley de los Derechos de las Personas Adultas Mayores, Mexico, DOF, 2016, available at http://www.dof.gob.mx/nota_detalle.php?codigo=5460845&fecha=14/11/2016 (accessed on: 1 February 2017).

⁴² Secretaría de Desarrollo Social, Lineamientos Específicos del Programa de Comedores Comunitarios para el Ejercicio Fiscal 2016, Mexico, SEDESOL, 2016, p. 20, available at http://www.normateca.sedesol.gob.mx/work/models/NORMATECA/Normateca/1_Menu_Principal/2_Normas/2_Sustantivas/Lineamientos_Prog_Comedores_Comunitarios_2016.pdf (accessed on: 9 February 2017).

⁴³ Ibidem, p. 21.

ISSSTE). This is the first security institution that has an advisory board comprised of independent scientists representing prestigious higher education or research institutions.⁴⁴

4. JUDICIAL PROTECTION OF SOCIAL SECURITY AND WELFARE RIGHTS

On 28 April 2016, the Federal Executive branch presented an initiative for constitutional reform⁴⁵ that proposes the elimination of Conciliation and Arbitration Boards (the bodies in charge of administering and applying labour justice, under the authority of the Federal Executive branch) to be replaced with Federal Judiciary courts. At the local level, these courts would form part of each state's judiciary.

The reform was passed by Congress in the second half of the year and has since been passed by 17 state congresses. Even the Senate has already issued a declaration of constitutionality on the reform for Articles 103 and 107 of the Constitution. The initiative has also been sent to the Federal Executive branch for its publication in the DOF⁴⁶ in the coming days.⁴⁷

With the implementation of the reform, positive changes are expected for workers – only for formal workers for the time being – which consist of: sped-up proceedings; an effective conciliation stage, which generally avoids having to go to trial; and conflict resolution by a judge, which replaces the tripartite boards. These boards, consisting of a representative for the worker, one for the employer and one for the government, should be fairer in principle, but the boards were in fact politicized and this hampered proceedings.

Drawbacks include the probability that some judges will not have the proper training in social law, as sometimes occurs in appellate courts, and therefore, the effective application of some of the inherent principles of labour law that benefit workers might be lost, such as:

- in dubio pro operario – in case of doubt, it should be settled according to what most benefits the worker; and
- the principle of fairness, which gives rise to the employer's burden of proof and the examination of the complaint. This means that when the actor is a worker or beneficiary

⁴⁴ Diario Oficial de la Federación, Manual de integración y funcionamiento del Consejo Asesor Científico y Médico como el órgano consultor superior del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado, Mexico, DOF, 2016, available at <http://www.diputados.gob.mx/LeyesBiblio/regla/n459.pdf> (accessed on: 15 January 2017).

⁴⁵ Presidencia de la Republica, Iniciativa de reforma constitucional en materia de justicia laboral, Mexico, Presidencia de la República, 2016, available at https://www.gob.mx/cms/uploads/attachment/file/87471/JUSTICIA_LABORAL__CONSTITUCIONAL_.pdf, (accessed on: 6 February 2017).

⁴⁶ This is the acronym for the Federal Official Gazette.

⁴⁷ Senado de la República, "Senado emite declaratoria constitucional la reforma en materia de justicia laboral", Boletines, Número-974, Mexico, Senado de la República, 2017, available at <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/34097-senado-emite-declaratoria-constitucional-la-reforma-en-materia-de-justicia-laboral.html> (accessed on: 17 February 2017).

thereof (e.g. a dependant), the Board, now court, can draw attention to the omissions or flaws in the complaint and grant a grace period for correcting the errors.

The truth is that implementation of the reform must take place before its effectiveness can be proved.

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6. ANNEX: RESEARCH RESOURCES UPDATE

a) Legislation

Constitución Política de los Estados Unidos Mexicanos

Ley del Seguro Social

Decreto por el que se adiciona la fracción XXI al artículo 10 y la fracción III al artículo 14 de la Ley de los Derechos de las Personas Adultas Mayores

Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Reglamento de Control Sanitario de Productos y Servicios

Lineamientos y criterios generales para la definición, identificación y medición de la pobreza

Manual de integración y funcionamiento del Consejo Asesor Científico y Médico como el órgano consultor superior del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado, México

Presupuesto de Egresos de la Federación para el año 2016

Resolución del H. Consejo de Representantes de la Comisión Nacional de los Salarios Mínimos que fija los salarios mínimos general y profesionales vigentes a partir del 1o. de enero de 2017

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c) Supreme Court Rulings Discussed, in Order of Appearance: ⁴⁸

SISTEMA DE AHORRO PARA EL RETIRO. Los fondos acumulados en las cuentas individuales deben entregarse a los trabajadores extranjeros que hayan cotizado en el régimen de seguridad social del IMSS, cuando regresen a residir a su país de origen Tesis: I.7o.T.17 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. III, abril del 2016, p. 2554

PENSIÓN DE CESANTÍA EN EDAD AVANZADA. Para obtenerla y reconocer las cotizaciones semanales al régimen del seguro social generadas antes de que el trabajador causó baja, cuando su reingreso ocurra después de 6 años, es necesario acreditar otras 52 cotizaciones semanales en el nuevo aseguramiento. Tesis: PC.I.L. J/26 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo III, noviembre 2016, p. 1882.

PLIEGO TESTAMENTARIO SINDICAL. El elaborado por la extinta trabajadora con base en el contrato colectivo de trabajo que rige las relaciones entre el IMSS y sus trabajadores (2009-2011), a través del cual designa a sus progenitores como beneficiarios, resulta ineficaz para que éstos tengan derecho al otorgamiento de la pensión de ascendencia, cuando se acredita la existencia del cónyuge supérstite

⁴⁸ Information is provided to make it easier to locate these rulings when using the Supreme Court of Justice webpage search tool at: <http://sjf.scjn.gob.mx/iusElectoral/paginas/tesis.aspx>

quien, en orden legal preferente, tiene derecho a la pensión de viudez. Tesis: VII.2o.T.49 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo IV, junio 2016, p. 2958.

DERECHO A LA PROTECCIÓN DE LA SALUD. DIMENSIONES INDIVIDUAL Y SOCIAL. La protección de la salud es un objetivo que legítimamente puede perseguir el Estado, toda vez que se trata de un derecho fundamental reconocido en el artículo 4o. constitucional, en el cual se establece expresamente que toda persona tiene derecho a la protección de la salud. Tesis 1ª. CCLXII/2016, Semanario Judicial de la Federación y su Gaceta, Decima Época, t. II, noviembre de 2016, p. 896.

INSTITUCIONES PÚBLICAS DE SALUD. Para dar de alta a un paciente y concluir sus obligaciones en la materia, es insuficiente que una tercera persona pueda estar a cargo de él, si no se justifica objetivamente que dicha persona cuenta con los medios requeridos para afrontar todas las necesidades inherentes del paciente. Tesis: II.1o.25 A, Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo IV, octubre de 2016, p. 2941.

CONSENTIMIENTO INFORMADO EN MATERIA MÉDICO-SANITARIA. Sus finalidades y supuestos normativos de su excepción. Tesis: 1a. CXCVII/2016 (10a.) Semanario Judicial de la Federación y su Gaceta, Décima Época, t. I, julio de 2016, p. 314.

PRESTACIÓN DE SERVICIOS DE ATENCIÓN MÉDICA. Contenido del deber de informar al paciente en materia médico-sanitaria. Tesis: 1a. CCXXV/2016, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. I, septiembre de 2016, p. 507.

PENSIÓN POR ASCENDENCIA. Procede cuando el trabajador en activo fallece como consecuencia de un accidente de trabajo, independientemente del número de semanas cotizadas en el régimen obligatorio del seguro social. Tesis: VII.2o.T.34 L, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. II, marzo de 2016, p. 1748.

INCAPACIDAD PERMANENTE TOTAL O PARCIAL. Los trabajadores que reciben la pensión correspondiente no tienen derecho a recibir asignaciones familiares y ayuda asistencial según la ley del seguro social vigente hasta el 30 de junio de 1997 Tesis: 2a./J. 169/2015, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. II, Enero de 2016, p. 1186.

PENSIÓN POR INCAPACIDAD PERMANENTE, PARCIAL O TOTAL. Los asegurados que la obtengan conforme a la ley del seguro social vigente hasta el 30 de junio de 1997, no tienen derecho a disponer de los recursos acumulados en las subcuentas de cesantía en edad avanzada, vejez, cuota social y estatal, de la cuenta individual, Tesis VII.2o.T.62. L, Semanario Judicial de la Federación y su Gaceta, Decima Época, t. III, julio de 2016, p. 2178.

DERECHO A LA SALUD DE LOS INTERNOS EN UN CENTRO FEDERAL DE READAPTACION SOCIAL. Acciones que el juez de amparo debe exigir a las autoridades responsables para preservar la calidad de vida de los reclusos enfermos y gestiones que éstas deben realizar cuando se acredite que la opción más adecuada para tratar su padecimiento es incompatible con las políticas públicas en materia de salud. Tesis VII.2º P. J/2, Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo III, febrero 2016, p. 1966.

DERECHO A LA PROTECCIÓN DE LA SALUD. Su instrumentación respecto de individuos privados de la libertad, debe operar en el contexto regulatorio de los centros de reclusión en donde se encuentren. Tesis: I.8o.A.2, Semanario Judicial de la Federación y su Gaceta, Décima Época, t. IV, septiembre de 2016, p. 2656.

DERECHO A LA SALUD. La suspensión concedida en el juicio de amparo respecto de la omisión de brindar atención médica a los internos de un centro federal de readaptación social, debe tener como efecto inmediato la prestación del servicio de acuerdo con el procedimiento del reglamento relativo.

Tesis: I.8o.A.98 A (10a.), Semanario Judicial de la Federación y su Gaceta, Décima Época, t. IV, septiembre de 2016, p. 2657.

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