

Argentina

Introduction

The labor and employment rights that govern Argentina stem from the Argentine Constitution; international treaties; the Employment Contract Law (ECL), N° 20,744, as amended; several federal statutes and collective bargaining agreements.

The Argentine Constitution grants power to the federal government to enact employment and labor legislation applicable to all provinces. Under this authority, the central government has enacted comprehensive statutory regulations of employment and has created the National Ministry of Labor to enforce the employment laws in the federal territories, collective bargaining agreements laws and union laws. Among other functions, the National Ministry of Labor analyzes the national employment rates and develops programs for promotion of employment.

The labor authorities of each province are primarily responsible for enforcing Argentine labor and employment laws within their territories. One key function is the overseeing of a strict registration requirement, whereby employers register each employee and maintain essential employment information.

All administrative offices are charged with conducting on-site inspection of working conditions and auditing employers to ensure full compliance with the law. In the event that a violation is found, an employer is entitled to procedurally argue his or her defense. The administrative office then has the discretion to impose a fine against the employer. The amount of the fine that may be levied varies from province to province.

The provisions of the ECL and any other statutes apply to all employees of the private sector (except agricultural and domestic workers), regardless of their position. The labor laws set out the minimum standards that employers and employees must follow. These provisions apply to all contracts executed under Argentine territory, regardless of the nationality of the parties or the place where the contract has been entered into.

Terminations

Restrictions On Employers

No legal formality is required to create an employment relationship; however, once created, the relationship is endowed with legal significance and the expectation of certain rights. Employment is assumed to last for an indefinite term and can be terminated by the employer without penalty only for just cause.

It is neither required nor customary for employers to issue or offer letters or employment contracts when hiring for an indefinite term. However, the written formality may be convenient for defining other issues of the contract, such as salary conditions, work hours, etc. However, special hiring alternatives do require a written agreement, because they are special exceptions to the general rule of indefinite-term employment.

The exceptions to the indefinite term employment are the following:

- (i) **Probation period:** The first ninety days of all indefinite term employment contracts cover what is known as a probationary period. During this period, the employer may discharge the employee without just cause, with 15 days of prior notice and without need of any further payment and/or severance indemnity. An employee may not be subject to more than one probationary or trial period with the same employer.
- (ii) **Fixed-term contracts:** These are available and applicable only in specific and extraordinary cases (i.e., when the end of the term of the contract is fixed and certain), with a minimum of one month and a maximum hiring period of five years. In case of normal termination of a fixed-term contract exceeding one-year term, the employee will be entitled to 50% of the indemnity for seniority payable under an indefinite term to employees who are terminated without just cause. The fixed term employment contract may be renewed, but the total length of the relationship may not exceed five years. Because these contracts are an exception to the indefinite term rule, the courts see these contracts with restrictive criteria. If more than one renewal is made, it will most likely be construed that the employer is mischaracterizing the form of hiring.
- (iii) **Contingent-Temporary contracts:** These are executed to cover a specific type of work or a specific service, as determined by extraordinary circumstances.

With regard to contracts (ii) and (iii), upon the normal termination of the contract, either by the lapse of its term or completion of the service or work, respectively, the employee will not be entitled to further payment and/or severance indemnity, unless: (a) the fixed-term employment contract has been executed for over one year, or (b) either the fixed-term contract or the contingent-term contract is terminated without just cause before the lapse of the term or the completion of the service or work, respectively (breach of contract). In case of early termination without just cause of a fixed-term contract or a contingent-term contract, the employee will be entitled to the regular severance of an indefinite-term employee, plus damages, usually set as the remaining salary until the end of the term of the contract.

- (iv) Contingent - Seasonal Contract: This is executed based on the kind of activity performed by the employee who provides his/her services only at a specified time of the year.
- (v) Apprenticeships and Internships. The apprenticeship is an employment contract available only for individuals between 16 and 28 years old who are unemployed at the moment of hiring. Employers and apprentices must comply with a training program. The work timetable may not exceed 40 hours per week. The minimum term of the contract is three months and the maximum term is 12 months. In all cases, the Employer must give a one-month prior termination notice, or otherwise pay half a month's salary.

Upon expiration of the contract, the apprentice is not entitled to any severance payment. In case of early termination without just cause, trainees may claim for severance payments. This contract is not customary because employers prefer to use internships, which are a special alternative for training purposes. Internships are not considered employment and are, therefore, exempt from social security contributions. Internship contracts are available only to students or to certain unemployed youth. There are different alternatives for internships and each one is governed by different rules and proceedings. The term of the internship as well as the work schedule varies in each alternative.

The employment contract may terminate for the following reasons:

- Mutual consent;
- Employee's resignation;

- Employer's dismissal of employee, with or without just cause;
- Employee's death or total disability;
- Employee's retirement;
- Employer's bankruptcy;
- Expiration of an agreed fixed term of employment.

Except for the case of union representatives and workers council representatives (in which a judicial procedure is required in order to terminate them with just cause), employers are legally entitled to terminate any employment contract, at any time and without just cause. But, the employer must pay severance to the employee who is terminated without cause.

The employer may terminate employment with just cause when the employee has engaged in certain activities offensive or prejudicial to the employer, like theft of employer's goods, insulting a superior, lack of loyalty, etc. Just cause also includes insubordination, the employee's failure to act with dedication and good faith toward the employer, and habitual tardiness and absence. The activities that may be considered offensive or prejudicial to the employer are determined according to the general principles of law and legal precedents. The employer must provide the employee with a written explanation of the cause for termination. The employee can challenge such termination in a judicial proceeding in which the employer bears the burden of proof.

In certain cases, an employee may be entitled to an additional and specific pay. The law protects certain categories of employees in a different way. As explained above, employment with union representatives may not be terminated, and neither may the employer change their work conditions without just cause, within the term of one year after the end of their representation. The employer must follow a special procedure before the Labor Courts in order to dismiss a union representative with just cause. However, if the procedure is not followed, the representative may choose between being reinstated to his job or receiving, apart from the mandatory severance pay package, an additional severance pay equal to all the salaries that he would have received up to the end of his representation period, plus salaries for one additional year.

Pregnant, nursing mothers and newly married employees who are dismissed without just cause are entitled to an additional severance indemnity payment equal to one year of their salaries.

Most courts have accepted to applying the Anti-Discrimination Law No. 23,592 to employment cases. Following this law those employees dismissed on grounds of discrimination because of their race, religion, nationality, ideology, political affiliation, union opinion, sex, financial, and social and/or physical condition may demand their reinstatement or any other measure to remove the effect of the discriminatory act or to cease in its performance by means of summary proceedings (according to Section 43 of the National Constitution). Discriminated employees who are reinstated are entitled to back wages. The employees also have the option to terminate the employment contract with cause and claim the mandatory severance payments from their employers under constructive dismissal. Under the provisions of the Civil Code, the adversely affected employees may also claim for a compensation for pain and suffering or emotional distress.

Employees who are not properly registered in the employer's payroll are entitled to additional amounts that significantly increase the mandatory severance package.

Other cases in which employers are exposed to additional payments include those involving traveling salesmen, breach of a fixed-term employment contract, lack of payment of the mandatory severance package in due time and failure to provide employment certificates in due time.

Notice Provisions/Consequences Of A Failure To Provide The Requested Notice

Employees undergoing probation are entitled to an advance notice of the termination of their contract within fifteen days or to receive a payment in lieu of notice of one half of the employee's monthly salary. Employees between three months and five years of seniority should be notified of their termination one month in advance or to be compensated with one month of salary. Employees who have more than five years of seniority should be notified within two months or should be compensated with a payment equal to two months of salary in lieu of notice.

If employers provide a written notice, employees are entitled during the aforementioned term to a paid daily license of two working hours, which may be accumulated in one or more working days within which the latter can look for another job.

If no prior notice is given, employers must indemnify the employees with an amount equal to one half, one, or two salaries net of social security contributions and

withholdings, as the case may be. When employees have gone past the probationary period and employers fail to provide notice, the payment in lieu of notice includes the outstanding days of the month of termination, plus the one or two months of salaries.

Termination Indemnities

In addition to the requirement to provide notice or pay in lieu of notice, the employer must also pay a termination indemnity, which is computed based on the years of service. Employees are entitled to one gross of his or her highest monthly and regular salary of the last twelve months for each year of service or any fraction thereof in excess of three months. In no event may this severance pay be lower than one's actual gross monthly salary.

For purposes of calculating this severance, the highest monthly and normal salary of the last year has a legal cap: it may not exceed three times the average of all the remuneration contemplated in the applicable collective bargaining agreement (CBA). If more than one CBA is applicable to the activity of the employer, the one most favorable to the employee shall be applied. This cap is applicable for unionized and non-unionized employees. On the average, this maximum amount (three times the average of all the remuneration contemplated in the pertinent CBA) is approximately AR\$3,500.

However, the Supreme Court of Justice ruled in 2004, in the case "*Vizzoti, Carlos A. vs. AMSA S.A.*", that if the application of the cap meant a reduction of the highest monthly and regular salary of the employee in more than 33%, the cap was unreasonable and therefore unconstitutional. The Supreme Court set the rule that the legal cap related to the CBA may not be lower than 67% of the highest monthly and regular salary of the employee. Consequently, in no event may the severance be less than 67% of the employee's salary per year of service or a fraction thereof in excess of three months.

In addition, within the Province of Buenos Aires, the Supreme Court of Justice of the Province of Buenos Aires has ruled that employers must also pay an additional 8.33% over the statutory severance on seniority.

This severance pay based on seniority is not subject to any taxes or social security contributions or withholdings.

Employers may be able to reduce the amount of the mandatory severance pay based on seniority by proving “force majeure”, (i.e., any circumstance beyond the employer’s control like a natural disaster or an act of government). Lay-offs must be in order of seniority and usually must comply with a special procedure before the labor authorities in the presence of the Labor Union, whereby the employer must give evidence of the critical situation. Judges are very restrictive as regards the application of this exception.

Employment Crisis Regulations

Law 24,013 sets forth a special procedure when employers plan on terminating or suspending employees due to a crisis and paying a reduced severance package.

Whenever the decision impacts collectively, employers must file the so-called *Company’s Crisis Preventive Proceedings* with the Ministry of Labor. Collective dismissals are defined as those dismissals (i) in excess of 15% of the whole staff when the employer has less than 400 workers, (ii) in excess of 10% of the whole staff when the employer has 400 to 1,000 workers, and (iii) in excess of 5% of the whole staff when the employer has more than 1,000 workers.

Should the employer fail to comply with the procedure, the labor authority may request to immediately cease the dismissals and to reinstate the employees, and/or impose fines resulting from the infringement of their request. Usually, the labor authority does not exercise these powers.

Laws On Separation Agreements, Waivers, And Releases

Separation agreements under mutual consent must be executed before a notary or labor authority. In such cases, employers are not bound to a statutory severance formula. Employers and employees can agree to any amount. However, many courts have declared that these agreements hide the true intention of the employer of discharging without just cause and have ordered the employer to pay the statutory severance.

According to Section 12 of the ECL, any agreement that reduces or suppresses the minimum standards set forth in the laws or collective bargaining agreements shall be deemed null and not legally binding. Thus, per this section, employees cannot waive or release employers from payment of any due amount.

However, Section 15 of the ECL sets forth that disputed rights can be settled before the labor or judicial authority, who must issue a grounded resolution approving the terms of the agreements when they are a just and fair settlement of the rights and interests of the parties. Under this provision, settlement agreements are permitted as long as the employees' rights are being disputed. Employers should compensate their employees with something reasonable and based on the concurrence of the labor or judicial authority as regards the agreement. Once the labor or administrative authority approves the agreement, this resolution is treated as a firm and indisputable ruling.

According to the plenary decision No. 137 of the Labor Appeal Courts of Buenos Aires city, the release clause inserted in a settlement agreement (stating that the employee has nothing else to claim against his or her employer) is valid and enforceable. On the other hand, the employer has entered into such agreement under the assumption that no further claims are to be made.

Therefore, when there is no settlement of a disputed right, the labor authority shall not approve the agreement. In practice, the labor authority does not approve separation agreements with mutual consent, but approves the agreement in which employer and employee agree upon the severance package and terms of payment.

Litigation Considerations

Since employees' silence ought not to be construed as consenting to the terms of their employment, employers are usually exposed to claims against them in connection with issues like unpaid overtime, salary differences due to a wrong categorization of their position, changes in the remunerative structure without their written consent, unpaid commissions, non-registered employment, remuneration or seniority, etc.

The statute of limitations for employment and labor issues is two years. Therefore, employees or former employees may file a claim against their employers pursuing collection of their credit within two years. However, employees can request the proper registration of their seniority or salaries at any time while their employment relationship is in force.

Due to the decision of the Supreme Court of Justice declaring the unconstitutionality of the statutory cap for dismissals without just cause in case it exceeds the employee's 33% of his or her highest monthly and regular salary, employers are now exposed

to claims related to outstanding balances regarding severance on seniority. Any payment allocated to dismissal without just cause, made during the last two years, which lacks the approval from the labor authority or a judge, can be challenged.

It is also customary for employees who have their seniority or salary improperly recorded to file claims when they fear that their employment is close to being terminated. It is highly advisable for employers to seek legal counsel before taking any action on the claim.

Within certain jurisdictions, such as the city of Buenos Aires, employees and their employers must first follow a settlement procedure before filing the complaint pleading. Many disputes are settled through these proceedings.

Employment Discrimination

Laws On Employment Discrimination

Section 14 of the Argentine Constitution contains rules for certain labor rights, including the principle of equal pay for equal work. Section 16 provides that all citizens are equal under the law.

The Supreme Court of Justice has ruled that the equal treatment rule should be understood as equal rights under the same circumstances and that the judges have the authority to decide under the principle of reasonability when equal or different circumstances exist.

Section 75, inserted with the Constitutional Reform of 1994, includes various references to the right to equal opportunities between different classes, especially regarding gender, age and physical impairment. In addition, Section 75 incorporates certain international treaties to the rank of constitutional rights. These treaties are related to human rights and many of them defer to the non-discrimination principle.

Section 43 of the Constitution sets forth a procedure to obtain immediate solution when a constitutional right is jeopardized, including any kind of discrimination.

Finally, the Constitution authorizes Congress to pass laws that include positive actions that assure the equal rights, opportunities and treatment.

Argentina is a member of the International Labor Organization and has approved several international labor conventions, including the Discrimination (Employment and Occupation) Convention of 1958 N° 111 and the Equal Remuneration Convention of 1951 N° 100.

As regards local law, the Anti-Discrimination Law N° 23,592 specifically prohibits any discriminatory practice, which includes discrimination based not only on race, religion, nationality, ideology, political affiliation, union opinion, and sex, but also economic standing, social condition and/or physical characteristics.

Under this law, those who impede, obstruct or restrict or in any way reduce the plain exercise, under equal basis, of the fundamental rights and warranties acknowledged in the National Constitution, shall be obliged, upon the victim's request, to withdraw the effect of the discriminatory act or to cease in its performance, and to compensate the victim for moral and material damages.

This law also aggravates the punishment when a crime is committed due to certain instances of discrimination, like persecution or racism, and other forms of discrimination against one's religion or nationality, or with the intent to totally or partially destroy a national, ethnic, racial or religious group.

In addition, there are specific laws that address protection against discrimination due to certain diseases, such as diabetes (Law N° 23,753), AIDS (Law N° 23,798), and epilepsy (Law N° 25,404).

Law N° 22,431, amended by Law N° 25,689, imposes on all governmental agencies and private companies with concession of public services to hire physically disabled but deserving individuals so that they comprise no less than 4% of the employee headcount. In addition, that law sets forth a tax benefit (special deduction for income or capital tax equivalent to 70% of individuals' remuneration) when employers hire physically disabled individuals.

Employment regulations also have numerous references to the anti-discrimination principle. The Employment Contract Law (ECL) includes several provisions, including Section 17, which prohibits any discrimination among employees on the basis of gender, race, nationality, religion, union and/or political membership and age. Section 81 provides that employers must treat their employees equally. The law also requires that such equal rights principle not be violated when an employee is treated differently based on his or her productivity, attitude towards work, etc.

Additional sections of the ECL also refer to certain discrimination practices. For example, Title VII of the ECL refers to women's work. Section 172 prohibits any discriminatory regulation or collective bargaining agreement based on gender or civil status and rules that all salary scales must be based on the principle of equal pay for equal work.

Section 175 prohibits employers from assigning work at the women's domicile, unless she is specifically hired for that purpose. Section 176 prohibits women from doing hard, dangerous or unhealthy tasks. Section 177 prohibits women from working 45 days before and after birth – the female employee has the option to reduce the license before birth to 30 days and extend the license after birth to 60 days. During this period, the employee is entitled to an allowance granted by the social security system equal to her salary. In addition, the law grants to the pregnant employee a protection against arbitrary dismissal. Section 178 sets forth a presumption that admits proof of the contrary (i.e., just cause, shut-down of facilities, etc.), that the dismissal is related to the pregnancy or birth when the dismissal notice is given within seven and a half months prior or after birth, as long as the employee is aware of her pregnancy and she is to give birth. According to Section 182, if employees are dismissed within those periods they will be entitled to thirteen monthly salaries, considering the normal and regular monthly salary.

Section 180 also prohibits any kind of discrimination based on the act of matrimony, and Section 181 sets forth a presumption of discriminatory dismissal when the employee is dismissed without just cause within three months before or six months after the marriage. According to Section 182, employees are entitled in these cases to thirteen monthly salaries, considering the normal and regular monthly salary. The courts have extended this protection to men, when employees show that termination has been decided due to their marital status.

Originally, Section 189 prohibited work of minors younger than fourteen years of age, whereas Section 187 permitted work of minors who were between fourteen and eighteen years of age and ruled for equal pay with the rest of the work force, when they performed similar tasks. Section 190 prohibited work of minors between 14 and 18 for more than six hours per day and 36 hours per week, although minors above sixteen years of age can work beyond this limit when authorized by the labor authority. Work is prohibited for minors during night shifts - that is, between 8 p.m. and 6 a.m. Recently, Law 26,390 (effective June 2008) amended these sections and raised the minimum working age to 16. The prohibition to hire minors under 16

will not apply to relationships that were in force when Law 26,390 became effective. For these ongoing relationships, the law states a transitory period up to May 25th, 2010, during which the minimum working age will be 15.

Under Section 73, employers cannot force employees to declare their opinion about political, religious or union issues.

According to the Union Law N° 23,551, employers cannot discharge works council representatives, nor can they change their employees' work conditions. A special judicial procedure must be followed in order to sanction or terminate a representative with just cause.

In addition, all collective bargaining agreements define categories with their job positions and salary scales for minimum wages for each position. Employers must frame their employees within the defined categories. Employees who have been performing tasks defined under another category are entitled to collect accordingly.

Employee Remedies And Potential Employer Liability For Employment Discrimination

Discrimination is an offense to the victim that can lead to different consequences, including a claim of reinstatement, salary differences, grounded termination, and even civil damages for intimate suffering. Argentine law does not have specific provisions related to punitive damages.

According to the Anti-Discrimination Law N° 23,592, those discriminated against based on race, religion, nationality, ideology, political affiliation, union opinion, sex, economic standing, social condition and/or physical characteristics may request the reinstatement or any other precautionary action to withdraw the effect of the discriminatory act or to cease in its performance. The affected individual may file this petition under Section 43 of the National Constitution, which provides for a summary proceeding that guarantees constitutional rights. Under the provisions of this law, the affected individual may also seek compensation for emotional suffering and wages. Most courts accept that this law applies to employment-related cases.

In addition, under the ECL, employees who receive unequal treatment without justified cause are entitled to pursue the outstanding balance of salaries that they should have collected. Should employers refuse to pay such balance, affected employees may terminate their employment and pursue the regular severance, under the theory of constructive termination.

As regards specific payments in the law imposed on employers that violate a mandatory protection period, the ECL only provides for an aggregate pay of one year of salaries when termination is made during pregnancy or after a recent birth, or during a certain period before or after marriage. In addition, the Union Law N° 23,551 grants union leaders the choice, when employers sanction them or dismiss them without following the judicial procedure, to request reinstatement by means of interim measures or to request a special compensation for damages, equal to the remaining term of representation plus one year of salaries. The law also sets forth a fine due to unfair union practice.

In practice, employees usually pursue statutory severance (including specific payment by virtue of an employee's marriage, maternity needs, or the needs of union leaders) due to grounded termination. When no specific payment is foreseen as a sanction (such as discrimination based on disease, sexual orientation, political opinion or affiliation, etc.), courts usually award additional damages due to the emotional suffering.

Claims of reinstatement and lost wages are common in the cases of union leaders and very uncommon for the rest of the cases in which employers are charged with discrimination.

Under Section 1113 of the Civil Code, employers are directly liable for damages caused by their employees. In cases of discrimination, the only defense employers can use is that the case has been unforeseen and unavoidable, per Section 514 of the Civil Code.

Practical Advice To Employers On Avoiding Employment Discrimination

In order to minimize employers' liability resulting from discrimination offenses, employers should demonstrate that they have taken reasonable steps to prevent any type of discrimination against their employees. They may institute policies, instructions and/or complaint procedures against all forms of discrimination and other appropriate remedial measures.

Employers do not have statutory procedures or judicial guidelines to follow when they commit a discriminatory act. It is advisable that employers immediately initiate

an internal investigation to find out the truth and collect evidence. Once the evidence is collected and discrimination is confirmed, management should decide disciplinary actions and/or a dismissal with just cause of the erring party.

Argentine law provides that both parties must prioritize the continuity of the relationship. Like any other serious offense, the victim must give the employer the opportunity to be informed in order to resolve the situation. When employers fail to take any measure, employees are then entitled to terminate the employment contract, or to request reinstatement, and/or to file any other judicial claim.

As explained above, employers may grant a special treatment to certain employees in a special situation, but it is convenient to keep appropriate records of any such decision, in order to avoid unjustified claims of discriminatory practices.

Sexual Harassment

Laws On Sexual Harassment

Presently, sexual harassment in the workplace is not a pressing legal issue for employers in Argentina. There is no special legal statute or regulation dealing with this issue as regards the private sector nor have there been many rulings.

The statute for the public administration sets out some rules that can be understood by the general public. Sexual harassment is defined as a coercive action of a government official that in the exercise of his or her functions takes advantage of his or her work position, inducing another person to consent to his or her sexual requirements, even if the sexual act is not consummated.

This lack of regulation in the private sector is filled by the application of general principles of civil and labor law, along with the opinion of legal experts and commentators. Under the Civil Code, those who arbitrarily interfere in someone else's life by tormenting him or her emotionally or physically, or intruding in his or her privacy will be obliged to cease in such activities, and to give fair compensation. Legal commentators and judges have defined sexual harassment as the act of a pursuing, importuning or bothering a lower-ranked employee in order to obtain a sexual favor, through a repetitive conduct, under the pressure or threat being discriminated against or segregated from the workplace due to his or her refusal to accept the demands. They opine that an invitation or proposal to a lower-ranked employee without the threat of being discriminated against or segregated from the

workplace is not sexual harassment. The general opinion is also that employees who have accepted the proposal are presumed to have accepted a form of seduction, unless for some reason, the employees have been seriously affected. However, office affairs may lead to charges of favoritism or unfair and biased practices.

The employee's refusal to accept a sexual demand may lead to sanctions, which a labor court may define as unequal treatment or persecution.

The sexual aggressor's conduct is considered illegal where he or she offends his or her victim by undermining him or her and restrains his or her freedom of sexual choice. Employers may thus be held liable for such harassment.

Finally, the sexual harassment may constitute a crime under Law N° 25,087, which provides that those who sexually abuse someone through violence, threat, coercion, intimidation, or abuse of an employment relationship, of authority or of power, taking advantage of the fact that the victim, by any cause, could not be able to willingly consent to the action, shall be punished with a prison term ranging from six months to four years. The punishment shall be increased from four to ten years when the abuse, due to its duration or circumstances in which it has been done, configures a serious outrage of sexual submission for the victim.

Employee Remedies And Potential Employer Liability For Sexual Harassment

Employers are directly liable if they are individuals acting as harassers, or indirectly responsible if the harassers are employees with authority.

Legal commentators agree that harassed employees must prove that their employers had knowledge of the harassers' conduct and that they did nothing to avoid it.

Sexual harassment is an offense to the victim that could lead to a grounded termination, and even civil damages for pain and suffering.

Harassed employees are entitled to terminate the employment contract and pursue indemnification from their employers under the ECL, as constructive termination (indirect dismissal).

In addition, harassed employees may seek additional compensation grounded under tort rules of the Civil Code provisions. Employees may seek compensatory damages for medical attention, along with pain, suffering and emotional distress. Employees have the burden of proving (i) the damage and (ii) their employer's liability. There

is no cap to the amount of this compensation, and there have not been many cases brought to our courts in order to recover damages. Argentina's current legislation does not provide for punitive damages.

When the courts extend the liability to an employer, they argue that the employer has been aware of the harassment and has failed to adopt a measure to punish the harasser.

Employers may dismiss a harasser with just cause, but must have proof of such conduct.

The collection of evidence in these cases is very difficult, and courts have been flexible in their evaluation thereof. However, when there is no evidence of the harassment, the courts dismiss the complaint.

Practical Advice To Employers On Avoiding Sexual Harassment Problems

Since there is no statute specifically related to sexual harassment, there is no statutory defense available to employers.

These cases are usually settled before they go to court. Nevertheless, there are a few court rules that may be used as guidelines, such as demonstrating that employers have taken reasonable steps to prevent such harassment in the course of employment, through certain management policies, instructions and/or complaint procedures.

Legal commentators agree that employers must be given notice of the offense and the opportunity to amend it, and that legal liability exists for an employer whenever it has actual or constructive knowledge of the illegal conduct.

In order to avoid any liability, employers should take immediate action (such as extensive investigation and appropriate remedial measures) whenever they receive a notice that sexual harassment has been committed.

Even so, under the terms of Section 1113 of the Civil Code (objective liability for employee's actions), the courts may nevertheless find employers liable if they empowered someone and failed to control him, or if they should have known about the risk they were creating, even if they did not actually or constructively know about it.