

# Colombia

## Introduction

In Colombia, the Labor Code (Law 141, 1961) regulates private employment relations within the principles and guidelines established in Articles 25, 53 and 54, among others, of the 1991 Constitution. The Labor Code develops the principles to be applied in labor relations, which may be of an individual (labor contracts, vacations, social security, etc.) or of a collective nature (association rights, collective bargaining, etc.).

The 1991 Constitution prohibits discrimination against anyone by reason of their age, skin color, gender, religious beliefs, or political opinions, including by employers. In particular, Articles 25 and 334 provide the right of a person to be employed as a social obligation entitled to a special protection from the State and establish the duty of the State to intervene in such a way that employment is guaranteed to the fullest extent possible.

As a result, Colombian labor legislation is generally favorable to employees. Laws such as Law 100, 1993, Law 50 of 1990 and Law 797, 2003 have enforced constitutional principles by providing mechanisms that assure equity within labor relations, and by amending and updating dispositions contained in the Labor Code to cover the current world and national context.

Law 797, 2003 reformed the Labor Code in subjects such as the payment of indemnities upon unilateral termination or dismissal by the employer. However, what constitutes just cause for purposes of unilateral termination by either of the parties has not changed, nor have the means of terminating labor contracts.

## Termination

### Termination Indemnities

The Labor Code establishes that a labor contract may be terminated by the unilateral decision of any of the parties with or without a proven just cause. The labor contract can also terminate by mutual consent. The Colombian Labor Law does not require a notice period to the employee regarding the date of the effective termination of the employment contract, except for terminations for just cause, as set out below.

Irrespective of the cause for termination, employers must pay employees all outstanding mandatory amounts due to the employee immediately upon termination, which vary depending on the kind of salary agreed between the parties. Colombian labor law allows two types of salary arrangements: (1) the so-called traditional structure, under which salary and social benefits are paid separately; and (2) the so-called integral salary structure, under which the mandatory benefits are already deemed to be included pro-rata in the monthly salary payments. The integral salary must be agreed in writing and it is only applicable to employees earning more than 13 minimum legal monthly salaries. Currently, the minimum monthly integral salary is of Col. Ps.\$5.999.500. Upon termination of employment, employees in the traditional salary structure are entitled to the following minimum legal benefits: pending salaries, severance aid, interests on severance, semester bonus and pending vacations. Employees under the integral structure salary would only be entitled to pending salaries and vacations.

However, depending on the employee's case, additional payments may arise at the termination of employment, including:

- (a) Extra legal benefits owed;
- (b) If employment is terminated without just cause, an indemnity for dismissal would have to be paid and, in the case of termination by mutual consent, it is a common practice to recognize a settlement bonus and additional extralegal benefits;
- (c) If the employee was never a part of the social security system, the employer would have to recognize pension payments plus moratorium interest and health expenses.
- (d) The failure to pay salary and social benefits can also generate a delayed payment indemnity after termination of employment, if payment has not taken place, equivalent to one day of salary per each day of delay for a period of 24 months. If payment is not made after 24 months, moratorium interests shall apply at the maximum rate defined by government authorities. The salary and social benefits are certain and indisputable rights of the employees, and therefore they cannot be waived; and
- (e) If the severance aid was not deposited in a severance fund, by the dates required by law, the employee subject to ordinary salary would be entitled to an

additional indemnity. This indemnity is equivalent to the payment of one day of salary for each day of delay in the deposit of the accrued severance, counted from February 15, of each calendar year, up to the date of termination of employment or until the date of the deposit, what ever occurs first. The failure of the employer to pay interest on severance on a timely basis requires that the payment of the interest be calculated at a rate of 24% of the severance aid.

It is important to point out that the obligation to pay the failure indemnities is not automatic. The employer's behavior or reasons for not paying the social benefit must be considered by the judge and finally qualified as "bad faith." The decision will depend on the judge's criteria when evaluating whether the employer acted in good or bad faith, which is a subjective matter. The employer has the burden of proving that it acted in good faith: that the failure to pay was not an intentional act to avoid the law and that there were legitimate reasons for not making the severance aid deposit.

There is no uniform position in Colombian courts concerning what is considered to be "good faith;" similar cases have been evaluated differently. There have been cases in which companies have been acquitted and other cases where a similar argument has resulted in an employer receiving an automatic judgment against it for the failure indemnity.

The statute of limitations for labor matters is three years; the employee's right to claim the payment of the severance aid, the interests on severance and the failure indemnities is three years from the date in which the obligation becomes demandable. A simple claim by the employee, which is received by the employer, making reference to the payment owed, interrupts the statute of limitations period once, which means that the three years commences again as of the date of the claim.

In all terminations the employer must deliver the following retirement documents to the employee: (i) labor certificate indicating date of entry, type of contract, last salary earned and date of termination; (ii) an order for the medical retirement exam; (iii) the final liquidation of separation benefits (including the legal indemnity for dismissal, if this is to be the case); (iv) an order to cash the amounts accumulated for severance aid on the severance fund; and (v) copy of the written records of the payment vouchers of social security quotations and payroll taxes, performed in

favor of the employee during the last three months of services. As the vouchers for the last month of services arrive one month late, the employer must send them to the former employee's home address through certified courier.

The failure to deliver the referred vouchers will result in an ineffective termination of the employment contract.

## **Legal Motives To Terminate The Employment Contract**

The law varies depending upon the motives for ending the labor contract. The most common motives are:

### **Termination Of Employment With Just Cause**

Just causes for terminating a labor contract unilaterally are those established by Article 7, Decree 2351, 1965 or those offences of the employee defined by the employer as grave actions that give rise to dismissal (said offences are usually provided in the Internal Work Regulations, in the labor contract or any other labor regulation). Just causes must be stated in writing at the time of termination; employers cannot invoke other causes later.

When the labor contract terminates with just cause, the party that makes the decision is not legally obliged to pay an indemnity for dismissal, as long as the facts and reasons that motivated the decision are real and can be further proved. Depending on the case, termination of employment with just cause must be handled with care and it might require a previous special proceeding or further consideration with labor attorneys. In any case, employers must have serious evidence to demonstrate the just cause and should keep all the documents necessary to support their decision in the event of a judicial claim. The employer will have to prove the reasons for termination while the employee only has to inform the judge that the just cause did not exist.

The following are the just causes stipulated in the Colombian Labor Code for termination of employment that can be invoked by the employer:

- (a) When the employee has deceived the employer, presenting false certificates for his admission or for the purpose of obtaining an improper advantage.

- (b) Any act of violence, insult, bad treatment or serious insubordination on the part of the employee, during his work, against his employer, members of the latter's family, the directive personnel or fellow workers.
- (c) Any serious act of violence, insult or bad treatment by the employee, outside of work hours, against the employer, members of his family, or against his representatives or partners, shop foremen or watchmen.
- (d) Any material damage willfully caused to buildings, works, machinery, raw materials, instruments and other objects connected with the work, and any grave negligence which endangers the security of persons or things.
- (e) Any immoral or wrongful act committed by the employee in the workshop, establishment or place of work, or in the development of his duties.
- (f) Any grave violation of the obligations or special prohibitions imposed upon the employee, in accordance with Sections 58 and 60 of the Labor Code, or any serious offense or fault classified as such in pacts, collective agreements, arbitration awards, individual labor contracts or work regulations.
- (g) The imprisonment of the employee for more than 30 days, unless he is subsequently acquitted, or his correctional arrest for more than eight days, or even for a lower period, when the reason is sufficient in itself to justify the termination of the labor contract.
- (h) When the employee reveals technical or commercial secrets of the employer or discloses matters of a reserved nature, which harms the employer.
- (i) Deficient work in relation to the capacity of the worker, and to the average yield in analogous work, when not corrected within a reasonable time, notwithstanding notification duly given.
- (j) The systematic non-performance, on the part of the employee, without any valid reason, of his contractual or legal obligations.
- (k) Any vice of the employee, which perturbs the discipline of the establishment.
- (l) The systematic omissions of the employee to accept the preventive, prophylactic or curative measures prescribed by the physician of the employer or by the authorities to avoid diseases or accidents.
- (m) The ineptitude of the employee to perform his work.

- (n) The recognition of the retirement or disability pension to the employee, being at the service of the employer. This just cause can be alleged immediately or in the future. The Supreme Court has declared that immediate termination after knowing the pension status of the affected employee is not required and that the employer does not lose its enforceability if it fails to allege it immediately. The law establishes that the pensioner must have an express recognition of his status and should also be receiving effective payment from the system.
- (o) Any contagious or chronic disease of the employee, not of a professional nature, as well as any other disease or wound which disables the employee for his work and when its healing has not been possible for over a period of 180 days. However, the dismissal of the employee for this reason may only be effective upon expiration of the period mentioned, and does not exonerate the employer from the obligation to pay the legal and contractual benefits and indemnities arising from the sickness.

In the cases contemplated from (i) to (o), in order to be able to terminate the labor contract, the employer must give the employee an advanced notice of no less than 15 days.

In some events, special procedures have been established by law in order to unilaterally terminate a labor contract with cause. For example, Article 2 of Decree 1373/1996 stipulates that in order to terminate the labor contract with just cause due to deficient work of the employee, the employer must send a formal written communication to the employee, twice, with a period of time between the two communications of eight business days. Such communications must indicate the reasons why the employer considers that the employee has a deficient work.

### Termination Of Employment Without Proven Just Cause

When an employer terminates a labor contract without the existence of a proven just cause, the employer is obliged to notify the employee of its decision and pay the corresponding legal indemnity. In order to have appropriate evidence, and for probationary purposes, this notification should be made in writing. From a legal point of view, no special format has to be followed and no minimum prior notice is required.

If an employee is terminated without one of the proven just causes expressly set forth in the law, the employee is entitled to an indemnity for unilateral termination by the employer. The amount of this indemnity varies depending on the salary level of the employee and the duration of his or her labor contract.

For contracts entered into for an indefinite term, the indemnity applies as follows:

- (i) For employees who earn less than ten minimum legal monthly salaries (for 2008, Col. Pesos \$4.615.000), the indemnity is equivalent to 30 days of salary for the first year of service and 20 additional days of salary for each additional year of service and proportionally for fractions of the year.
- (ii) For employees who earn the minimum legal monthly salary or more, the indemnity is equivalent to 20 days of salary for the first year of service and 15 additional days of salary for each additional days of salary for each additional year of service and proportionally for fractions of the year.
- (iii) For employees who had more than ten years of service as December 27, 2002, the indemnity is equivalent to 45 days salary for the first year of service and 40 additional days of salary for each year subsequent to the first and proportionally for fractions of the year.
- (iv) For employees who had 10 or more years of services on December 31, 1990, who have not waived their right to reinstatement action, the indemnity is equivalent to 45 days for the first year of service and 30 additional days of salary for each year subsequent to the first, and proportionally per fraction of year.
- (v) For contracts entered into for a fixed period of duration or for the duration of a specific job, the indemnity is equivalent to the salaries corresponding to the unexpired period of the contract, but in the case of contracts for the duration of the job, the indemnity cannot be less than 15 days salary.

Historically, this legal indemnity has been considered as a complete payment to compensate the employee for his or her condition of unemployment. Nonetheless, the Colombian Constitutional Court stated that the amount of the legal indemnity recognized for wrongful termination of the labor contract was not a definite or final payment and that the employees could file a complaint pursuing an additional indemnity if they proved further damages caused by the unilateral termination of employment.

Although no lawsuits have been filed as a consequence of this controversial decision, it appears that labor judges will follow traditional rules of liability in order to determine the existence of an additional detriment. Under this scenario, the employee will have to demonstrate, among others, the existence and value of the damage, and the relation between dismissal and damage, which is really difficult to prove in normal circumstances. Nonetheless, as a consequence of this decision, every dismissal carries the high risk of a lawsuit, with all its representation and administrative costs.

### Termination By Mutual Consent

The employment contract may also be terminated by mutual consent. Formalizing the agreement with a private transaction agreement or a public settlement agreement is advisable. These agreements include the employees' consent in writing to their termination, and they include the execution of a final full release and settlement agreement, when public, before a labor court or labor inspector in Colombia.

By means of a settlement agreement, the employees fully release the employer from any labor-related judicial claim with the effect of *res judicata*, which means that any future claim from the employees for facts related to the labor relationship that was terminated by mutual consent would have to be dismissed by a Labor Judge if all minimum labor rights were duly paid.

If the parties terminate the labor contract by mutual consent, the employer is not obliged to pay indemnity for unilateral termination (because there would not be a dismissal). In this event, the employer is only obliged to pay social and termination benefits. However, under certain conditions it might be reasonable to offer a retirement bonus to the employee, which might be equivalent to the indemnity for dismissal. Such sum is denominated as a settlement bonus in the termination agreement for purposes of ascribing it to any sum or benefit not paid to the employees during the course of the labor relationship due to an involuntary omission. In any case, the employer has the right to pay additional benefits at its sole discretion to further motivate the employee to provide his or her consent to the mutual consent arrangement.

In this event, written notice of termination is not necessary. The parties sign the private agreement or the settlement agreement before the labor authority, and the employer delivers the retirement documents referred as (i), (ii), (iii), (iv) and (v).

## **Restrictions On Employers**

There are certain events in which the employer cannot freely terminate employment agreements using the rights granted in Colombian regulations. Among other circumstances, there are limitations such as (a) collective dismissal; (b) the right for reinstatement for those workers who by January 1, 1991, had more than ten years of service under the same labor contract; and (c) prior authorization from the Court or the Ministry of Social Protection, which is required for certain special protected employees (i.e., pregnant women, founders or directors of a union, and seriously ill employees).

Unless the employer has a strong legal cause to terminate privileged employees, the employees can seek reinstatement to their current job position. In practice, this means that termination of the employees must be sought through a settlement agreement under which termination takes place by mutual consent.

For example, the voluntary reorganization of the employer's business is not deemed a legal just cause for termination of employment, thus the collective dismissal of employees requires the prior clearance from the Ministry of Social Protection. The employer must continue employing the employees and paying their wages and other labor benefits until such clearance is obtained.

The Ministry of Social Protection, in practice, does not grant such authorization without first thoroughly examining the claim, so as to be certain that the reorganization is really supported by the facts and that the employer has been complying in full with all labor obligations during the last three years. Ordinarily, even if the documentation is properly submitted, this is not a "beneficial" decision from a political point of view because the Ministry can take more than six months to approve the collective discharge.

Once permission from the Ministry of Social Protection is granted, the employer would be legally authorized to unilaterally terminate the employees and would only have to pay to the employees mandatory severance and indemnity obligations resulting from termination. No extralegal or other settlement benefits need to be recognized, and the employment agreements can terminate with a simple notification letter.

Employees with special privileges, that is to say employees who cannot be dismissed without just cause, preserve their legal protection if the employer maintains active positions or business units functioning in which those employees could perform

their work, even if there is permission from the Ministry of Social Protection to proceed with collective dismissal. Employees with special privileges include those with union privilege, those with maternity privilege, the seriously ill, disabled or handicapped employees, and those with the right to exercise the reinstatement action (in this last case, workers who by January 1, 1991, had more than 10 years of services under the same labor contract. The Supreme Court of Justice has established that such legal protection is not applicable when the employer closes down its operation in a permanent way with permission of the Ministry of Social Protection, taking into account that it is physically impossible to reinstate the employee because no job positions are available.

### **Laws On Separation Agreement, Waivers And Releases**

The advisable way to terminate the employment contract is by mutual consent, with ratification of the termination agreement in a public settlement hearing before the Labor Court (as explained previously) and payment of a retirement bonus to the employee.

In Colombia any person has the right to file a claim, even if termination of the employment was formalized by means of a settlement agreement and the Ministry of Social Protection authorized the dismissal. A labor judge would have to study and resolve the case. However, where the employees have signed settlement agreements, the probability of seeing a judicial complaint is much more remote. According to existing judicial rulings, the claim should be dismissed if the settlement agreement was duly executed.

Unilateral dismissal may leave the door open for a claim related to moral and economical damages caused by termination. The Colombian Constitutional Court has allowed those kinds of claims when employees prove that their unemployment has caused them serious damages. Even though these claims are not common, and it is difficult for the employees to prove the damages, these trials can be long and expensive.

### **Employment Discrimination**

Colombian legislation provides that if an employee is affected by discriminatory actions and is harmed in his or her fundamental rights, he or she can use an extraordinary action called a “Tutela action,” which provides a speedier mechanism for the protection of the fundamental right.

The interest shown by employers in avoiding discriminatory actions has become so significant that in 2002, Law 789 was enacted to create a special regime of payroll taxes to stimulate the recruitment processes of certain segments of the population (i.e., single mothers or disabled persons).

In addition, Law 931 of 2004 prohibits employers from having any regulation, policy or agreement limiting the participation of older people in a recruitment process or violating their right to equality and work. From an evidentiary point of view, it is difficult for an employment candidate to prove that a private company has discriminated based on the candidate's age.

Such legislation encourages employer companies to hire employees based upon their work or academic capacities and experience, excluding any requirement based on their physical qualities (such as youth). Employers can also take into account that the longer a person has been in the job market, the more know-how and knowledge he or she will have. Furthermore, companies that provide opportunities to older people are contributing to the country's employment statistics, which can be interpreted as a social achievement.

Employers should be careful when recruiting. For example, when drawing up organizational charts and creating job profiles, employers should take into account older applicants who are still in good physical condition, possess traits to join the job market, the maturity to handle specific situations and the knowledge and skills to perform certain activities.

In recruitment, it is important to bear in mind that according to Law 13, 1972, employers cannot ask the employee about marital status, number of children, religion or political party. Also, according to Decree 2150, 1995, the employer cannot require a military certificate and, pursuant to the rulings of the Constitutional Court, an AIDS exam (and other serious illness exams) cannot be required for a job.

## **Sexual And Labor Harassment**

The Colombian Congress issued Law 1010, 2006, effective January 23, 2006, that prevents and penalizes conduct that would constitute labor harassment within the execution of public and private labor relationships.

Labor harassment is defined as: “all persistent and confirmable conduct, exerted on an employee worker by an employer, an immediate or mediate hierarchic head or superior, a fellow employee or a subordinate, directed to inspire fear, intimidation, terror and distresses, to cause labor damage, to undermine the employee, or to induce the resignation of the same one.”

According to Law 1010, 2006, labor harassment can take place through various modalities such as: labor mistreatment, persecution, discrimination, obstruction, inequity and unprotection.

The Law identifies several types of conduct that constitute labor harassment, along with extenuating and aggravating conduct. It also provides two types of mechanisms to attack the conduct that constitutes labor harassment: (i) preventive and (ii) corrective. Employers must adopt an internal, confidential, effective and conciliatory procedure to deal with harassment conduct that can occur in the workplace. The law establishes some guarantees that exist against revengeful acts that can take place against those who make the complaint or act as a witness.

Although these legal provisions can help to create a healthier employment atmosphere and its purpose is valid, they can also become an obstacle for the development of the labor relationship. Harassment, for example, can be subject to multiple interpretations. Perhaps the emerging case law will clarify the situation.

When a case of labor harassment occurs, the employer should respond immediately. Employers should adopt and apply policies to comply with Law 1010, 2006. Internal mechanisms and policies must be drafted in such a way that they seek to maintain relations based on dignity and respect.

The law contains subjective language that can complicate the administration of labor relationships. The most likely result is that the number of claims will rise. It is also possible that the employer’s capacity to give orders to its employees may be obstructed or limited. It is also possible that employees could abuse the protections provided in the law, thus impeding the normal development of the labor relationship.

Proving the occurrence of conduct that can be classified as labor harassment is a subjective act. The number of claims filed could increase if the mechanisms for avoiding the conduct described in the labor harassment law are not adopted.

For the government, and specifically for the Ministry of Social Protection, this law is an invitation to look forward to a healthier labor atmosphere. The private sector, on the other hand, sees the norm with distrust, believing that it can represent a clear limitation of the employers' ability to instruct their employees, thus obstructing the employers' day-to-day operations. In any event, employers must create a suitable environment to listen to employees regarding the adaptation of the internal work regulations.

The sexual harassment issue is not well developed in Colombia. No case law exists that develops and explains the mechanisms that may be adopted for this type of conduct. Furthermore, no regulation of sexual harassment has been issued.

If moral or physical damages are caused by conduct such as sexual harassment, the affected individual can sue the aggressor, but the legal process could take a long time to be resolved.