

Mexico

Introduction

Article 123 of the Mexican Constitution provides the fundamental principles guiding employment relationships within Mexico. Specific regulation of the employment relationship, however, is largely statutory. The Mexican Federal Labor Law (FLL) contains detailed provisions concerning the minimum employment conditions and rights that employers must grant to their employees. Under the FLL, all labor rules are construed to achieve social justice between workers and their employers. The FLL applies to all employees who provide personal, subordinated services within Mexico, regardless of nationality.

In addition to the FLL, precedents from the Supreme Court and federal courts play an important role in regulating employment relationships. Mexican courts are responsible for the interpretation of the FLL's provisions. However, such courts are not empowered to alter or deviate from the FLL's unambiguous provisions.

Most Mexican practitioners agree that Mexican labor law has not kept up with the needs of a dynamic global marketplace. The FLL has not been substantively modified since 1970, or procedurally modified since 1980. The process for change is slow, partly because decision makers cannot agree on the direction modern Mexican employment law must take.

Terminations

Restrictions on Employers

As a general rule, Mexican law implies or presumes the existence of a contractual relationship between employers and their employees. The agreement may be written or oral, and express or implied. Whether and under what circumstances an employer may dismiss an employee depends on the specific nature of the employment agreement.

The FLL recognizes two general types of employment relationships: collective and individual. Collective employment relationships are established when employees are organized by a certified labor union and the union represents the employees in dealing with an employer. An individual employment relationship is created

automatically when an employer hires a worker to perform tasks under its control, whether on a temporary basis or for an indefinite term. In individual employment relationships, the law presumes the existence of an agreement between the employer and the employee. However, it is advisable for employers to execute a written individual employment agreement with each employee, to clearly establish the terms of the relationship.

There is a presumption under Mexican law that an employment relationship is for an indefinite period of time. An employer may eliminate this presumption by the execution of employment agreements that set forth that the nature of the services to be performed are for a specific job or term. The FLL recognizes the following types of individual labor contracts: contracts for a specific job, for a specified period of time (fixed term), and for an indefinite period of time (indefinite term). The circumstances of the particular job determine whether the employer may validly execute employment agreements for a specific job or for a specific period.

An individual labor contract for a specific job typically arises when an employee is hired for a specific assignment, such as for the construction or remodeling of a specific worksite. This contract ends upon the completion of the specific job without liability to the employer.

Similarly, an individual labor contract for a fixed term exists only when the nature of the employee's assignment so requires. The FLL recognizes this type of contract for the temporary replacement of an employee due to disability, vacation or temporary absence. This contract also may be used to hire employees to assist as seasonal workers or for performing certain temporary activities that cannot be carried out by an employer's regular staff.

Employees may challenge their employer's categorization of their contracts for a specific job or period of time by claiming that the services rendered are actually a part of the employer's permanent, ongoing business. If the employer fails to prove that the services performed under these contracts are not a part of the employer's regular and permanent activities, labor authorities may likely categorize the relationship as one for an indefinite term. Such a determination entitles an employee to severance pay or reinstatement following termination of the contract.

In light of this presumption and the heavy burden on employers seeking to diminish or eliminate the presumption, most individual employment contracts are entered into for an indefinite term. However, the term "indefinite" is not completely accurate,

because Mexican law implies a virtually *permanent* labor relationship under this type of contract. An employer cannot terminate, suspend or rescind an individual labor contract for an indefinite term without penalty unless it can demonstrate “just cause” under the FLL. Article 47 of FLL acknowledges that an employer has “just cause” for dismissing an employee when or if:

- (i) Such employee commits dishonest or violent acts, makes threats, offends or mistreats the employer, his or her family, co-employees, or the officers or administrative personnel, during working hours or outside the worksite, unless the employee is provoked to act in self-defense;
- (ii) During the performance of his or her work or by reason of it, the employee intentionally or by negligence, causes material damage to the work building, machinery, instruments, raw materials or any other goods of the company;
- (iii) Through negligence or inexcusable carelessness, the employee jeopardizes the safety of the establishment or the persons inside of it;
- (iv) The employee commits immoral acts in the establishment or place of employment;
- (v) The employee reveals manufacturing secrets or confidential matters to the detriment of the employer;
- (vi) The employee disobeys the employer or its representatives without reasonable cause in matters related to the work under contract;
- (vii) The employee refuses to adopt preventive measures or to follow the procedures to avoid accidents or illness;
- (viii) The employee works in a state of drunkenness or under the influence of a narcotic or depressant drug, unless there is a medical prescription in the latter case;
- (ix) The employee has a final judgment imposing a prison sentence, preventing him or her from fulfilling the employment contract; or
- (x) The employee gives reasonable cause for loss of confidence.

In addition to just cause, the FLL recognizes that the labor relationship may be terminated under other circumstances. The labor relationship may be terminated without penalty:

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- (i) By mutual agreement;
 - (ii) As a result of the death of the employee;
 - (iii) By termination of the specific job or the term of the capital investment;
 - (iv) By the physical or mental incapacity or disability of the employee;
 - (v) By “force majeure” or acts of God;
 - (vi) By the self-evident non-profitability of the operation; or
 - (vii) By legally declared insolvency or bankruptcy.

Conversely, according to the FLL, an employee also has just cause to rescind an individual labor relationship. Under these circumstances, the employee is automatically entitled to severance benefits:

- (i) If the employer deceives the employee with respect to the conditions of the job at the time it was offered (this cause will cease after the first 30 days of services rendered);
- (ii) If the employer or the employer’s family, officers or administrative personnel commit dishonest or violent acts, make threats, offend or mistreat the worker, his or her spouse, parents, children or brothers and sisters during or outside of working hours;
- (iii) If the employer reduces the employee’s salary;
- (iv) If payment of salary is not made at the usual or on the agreed date or place;
- (v) If the employer maliciously damages the employee’s working tools;
- (vi) If there is serious risk to the safety or health of the employee or his or her family; or
- (vii) If, through negligence or inexcusable carelessness, the employer endangers the safety of the workplace.

An employee also may resign voluntarily without just cause. If an employee resigns voluntarily, he or she is entitled to receive any accrued benefits, such as the Christmas bonus and vacation premium.

Notice Provisions/Consequences of a Failure to Provide the Required Notice

To dismiss an employee without liability for the severance payment, an employer must prove that it acted fairly, by, for example, providing appropriate notice. Specifically, an employer must prove that it dismissed the employee for just cause, that it gave the employee prompt written notice of the dismissal and that it stated the reason or reasons why the dismissal was “just.”

Employers must provide this notice to the dismissed employee within 30 days of the acts that allegedly justify the dismissal. The notice must be made available to the employee for his or her review and signature. If the employee refuses to receive the notice, the employer must advise the respective Labor Board within five days following the date of the termination. If the employer fails to abide by these notification obligations, the dismissal is considered to be unjustified.

Termination Indemnities

An employee who is unjustly dismissed or who rescinds the relationship for cause is entitled to receive severance payments consisting of the following:

- (i) Three month’s wages, based on those earned at the time of the termination;
- (ii) 20 days’ wages per each year of services rendered (this amount does not apply under certain circumstances);
- (iii) A seniority premium equal to 12 days’ wages per each year of services rendered (subject to a salary limitation of up to twice the minimum wage);
- (iv) Back wages from the date of the dismissal through the date of payment.

The seniority premium must be paid to all employees who: (i) voluntarily leave their employment after completing 15 years of service; (ii) leave their employment for just cause; (iii) are dismissed by the employer with or without just cause; or (iv) die while still employed, in which case their beneficiaries receive the seniority premium. In addition, an employee dismissed without cause has the option to be reinstated to his or her former job instead of receiving the severance payment, provided the employee does not work in a white-collar position.

Laws On Separation Agreements, Waivers And Releases

The FLL's employee-protection provisions apply to virtually every labor relationship in Mexico and are not subject to waiver by employees. In the case of employee's resignation, however, the law recognizes as valid a resignation letter from the employee stating that he or she resigned voluntarily and that the employer does not owe him or her any additional compensation.

However, and pursuant to Article 33 of the FLL, any waiver made by employees to earned wages and severance benefits is null and void by law. And any termination agreement to be valid shall be in writing and ratified before the Labor Board. The Board shall approve the agreement provided it does not contain any provisions that could contain any waiver of such rights and benefits.

Litigation Considerations

As stated above, employment law in Mexico has been slow to adapt to the changing needs of the global marketplace. The reasons for this are twofold. First, the level of sophistication and preparation on the part of both labor authorities and practitioners is lacking. Mexican law does not impose any formal requirements on labor litigation practitioners. The second reason is the ever-increasing number of labor claims filed before Federal and local Labor Boards. The increasing number of claims has created a seemingly insurmountable backlog for labor officials.

Employment Discrimination

Laws On Employment Discrimination

The Mexican Constitution provides that every person is entitled to basic constitutional rights regardless of sex, race, religion, age, political views or nationality. Among such rights are the labor principles contained in Article 123 of the Constitution. However, Mexico's legal provisions governing discrimination are not as developed as those in other countries. Generally speaking, employers are not liable to employees who experience discrimination in the workplace.

Employees do have recourse for discrimination under certain limited circumstances. For example, the FLL provides that employees performing equal work must be afforded equal pay. An employee has the right to bring a claim for pay equalization before the Labor Board. The FLL also provides specific maternity rights. A woman

cannot be employed to work in unhealthy or hazardous conditions, undertake industrial night work, work in commercial or service establishments after 10 p.m., or perform overtime work if the health of the mother or her child is put into danger, either during pregnancy or lactation. Women are also entitled to maternity leave of six weeks before and six weeks after delivery, during which the employee is entitled to her full wages. The law further provides that the full maternity period must be counted as time worked for purposes of seniority and length of service. Additionally, if it is impossible for the employee to return to work because of her pregnancy, the maternity leave is extended by the time necessary, and the employee is entitled to half pay for a period not exceeding 60 days.

The Mexican Federal Labor Law, in Article 173, states that the employment of children that are 14 through 16 years old shall be subject to special protection and inspection of the labor department. The Law forbids minor employees from working in places where alcoholic beverages are sold, in places where their morality may be damaged, in submarine or subterranean jobs, in dangerous or unhealthy activities, in activities in which their physical development might be retarded or in non-industrial establishments after 10 p.m.

Children who are over 14 but under 16 years old are permitted by the Law to work a maximum of six hours per day, distributed in two periods of three hours each, with a period of at least one hour between them. If these children are called to work on Sundays and mandatory days off, the employer shall pay an additional 200% of the base salary. Minors are not eligible to work overtime.

The violation of the Law regarding provisions for the employment of minor workers may result in a fine that rises from three to 155 times the minimum daily salary, pursuant to Article 995 of the Law.

Sexual Harassment

Laws On Sexual Harassment

It is rare for an employee in Mexico to seek legal remedies for sexual harassment. This area of Mexican law is largely undeveloped. Nevertheless, there are several pieces of legislation dealing with sexual harassment, including the FLL, the Criminal Code for the Federal District (“Criminal Code”) and the Civil Code for the Federal District (“Civil Code”).

The FLL does not specifically address “sexual harassment.” Nevertheless, such conduct could constitute cause for the harassed employee to rescind his or her employment relationship based on Section II of Article 51 of the FLL, which provides that, “Causes for rescinding the labor relationship without the employee’s responsibility are ... The employer, his relatives, officers or managerial personnel, committing, within the service, lack of integrity or honesty, violent acts, threats, defamation, mistreatment, or other acts of an analogous nature, against the employee, spouse, parents, children or siblings.”

In addition, a sexually harassed employee might argue that the employer breached its obligations under the FLL and is therefore subject to a fine. Article 132 of the FLL sets out the employer’s general obligations. Specifically, Section VI requires employers “to show due consideration for the employees, abstaining from mistreatment by word or action.” The penalty for breaching Article 132 is contained in Article 1002, which provides for a fine equivalent of up to 315 times the general minimum daily salary. In setting this multiplier, the Labor Boards and courts consider both the seriousness of the offence and the circumstances of the particular case.

Unlike the FLL, Article 259-Bis of the Criminal Code typifies sexual harassment. Such Article states in part that “a penalty consisting of a fine equaling up to 40 days, may be imposed against a person who, on an on-going basis, sexually harasses another person of either sex, taking advantage of his or her hierarchical position derived from their labor, educational, domestic or any other kind of relationship which implies subordination... Sexual harassment will only be sanctioned when it causes damage to the victim.” In order for sexual harassment to be found, the victim must establish: (i) that the harasser acted with a sexual intention; (ii) the harassment occurred on more than one occasion; (iii) the harasser is the victim’s supervisor or holds a superior position with the employer; and (iv) the individual harassing must be taking advantage of that superior position while committing the harassment.

An employee who has been sexually harassed may also make a claim pursuant to Article 1916 of the Civil Code, which provides a remedy for “moral damages.” Moral damages are defined as the injury to a victim’s feelings, affections, beliefs, decorum, honor, reputation or private life. In assessing the victim’s damages, the law also recognizes the consideration that others have for the individual.

On June 11, 2003, the Federal Official Gazette published a decree whereby Mexico's Federal Law to Prevent and Eradicate Discrimination (the "Discrimination Law") was enacted.

The new Discrimination Law defines and somewhat expands the legal range granted to discrimination matters by the Mexican Political Constitution, which previously established in Articles 1 and 123, the prohibition of discriminatory treatment in general and in labor matters specifically. Furthermore, the Discrimination Law complements the rules established for that purpose in Article 3 of the Federal Labor Law and in Agreement 111 of the International Labor Organization on discrimination matters (ratified by Mexico in 1961). Although the Discrimination Law includes provisions of a general nature, it establishes some concepts that may have implications specifically for the area of labor and employment.

Article 4 of the Discrimination Law provides that, for the purposes of the Law, discrimination shall mean any distinction, exclusion or restriction that has the effect of impeding or annulling the acknowledgment or exercise of rights and an effective equal opportunity for persons based on ethnic or national origin, gender, age, disability, social or financial conditions, health condition, pregnancy, language, religion, opinion, sexual preference, marital status or any other reason.

Article 9 of the Discrimination Law prohibits any discriminatory practice that impedes or annuls the acknowledgment of exercise of rights and an effective equal employment opportunity. On this basis, the following conducts should be deemed as discriminatory: Prohibiting the free choice of employment or restricting the opportunities to access, stay or be promoted thereat. It may be inferred that such prohibition defines employer-administered pregnancy tests as discriminatory conduct.

While the Discrimination Law does not create civil or criminal liabilities against parties practicing discriminatory conduct, such as those existing in other countries, it does provide for the creation of an administrative Council (the "Council") that may eventually take action against parties who fail to comply with the Discrimination Law.

Employee Remedies For Sexual Harassment

The type of remedy available, or penalty imposed, depends upon the legal authority under which the victim pursues the sexual harassment claim. An employee charging sexual harassment under Article 132 of the FLL is entitled to an award for damages.

The penalty for breaching Article 132 of the FLL is a fine of three to 315 times the general minimum daily salary, taking into consideration the seriousness of the offence and the circumstances of the particular case.

Criminal charges may be brought against the alleged harasser only if the victim agrees to bring the claim. Under Article 29 of the Criminal Code, the harasser is liable for a fine not to exceed 40 times the daily minimum wage. The criminal penalty is assessed only against the harasser; no criminal penalty is imposed against the company where the individual works.

Pursuant to Article 1916 of the Civil Code, when an illicit act or omission produces moral damages, the person responsible for such damages is required to repair them through monetary indemnification, regardless of whether material damages have been caused. The amount of the indemnity is determined by considering the rights violated, the degree of liability, the economic situation of the responsible party and that of the victim, and any other relevant circumstances of the case.

Equal opportunity rights for males and females.

Enacted in 2006 and based on equality and non discrimination principles, the Law for Equal Opportunities for Males and Females (“Law”) regulates gender equality and is intended to protect any individual who is placed in a situation of disadvantage due to gender.

The Law describes a total of three programs to make it enforceable, including a nation-wide program under which the equality rights must be observed by individuals and authorities to avoid gender discrimination in connection with social and civil stereotypes.

The enforceability of the Law is reserved for the Human Rights Commission and the applicable sanctions are described in the Public Official Responsibilities Law.

Practical Advice To Employers On Avoiding Sexual Harassment Problems

If an employee complains of sexual harassment, the employer should immediately investigate the employee’s charges. A prompt, thorough and fair investigation and good faith remedial action will likely be useful in defending the employer against a claim in Mexico. However, case law is sparse in this area.

Following the investigation, the employer must make a determination as to the validity of the claim. The strength of the claim and the evidence that supports it will dictate the appropriate response. If the occurrence of the offensive behavior is ambiguous, a warning may be appropriate. However, if it is clear that problems exist, the employer should consider requesting the harasser's resignation or terminating his or her employment.

An employer should be cautious when dismissing any employee, as the harasser may raise an unjust dismissal claim against the employer. If the evidence of sexual harassment is clear, it appears that based on the provisions of the FLL, a company may successfully defend the harasser's wrongful dismissal claim. Under the FLL however, the burden still lies with the employer to prove that it had just cause in dismissing the harasser. If the employer cannot satisfy this burden, the Labor Board may order the employer to pay the statutory severance to the employee under Article 50 of the FLL. Therefore, if the investigation is ambiguous or inconclusive, a severance arrangement may be the safest manner of dealing with the situation.