

Venezuela

Introduction

In Venezuela, prior to the 1997 reform of the Organic Labor Law (OLL), upon termination of their employment relationship workers were paid an “indemnity for seniority” (commonly known as “*prestaciones sociales*”), which consisted of 30 days’ salary per year of service. This indemnity had to be deposited each year in a bank trust or accredited to the employer’s books, but the amount had to be adjusted upon termination of the employment contract, in accordance with the last salary earned by the worker. Furthermore, if termination of the employment contract was the result of an unjustified dismissal, in most cases the employer had to pay double the amount of the indemnity for seniority.

In the labor reform of June 19, 1997, the indemnity for seniority was replaced with another benefit called “seniority payment.” The seniority payment is also paid to the worker upon termination of the employment relationship, regardless of the cause of the termination, but is calculated on a monthly basis and consists of five days’ salary per month of services rendered, as from the fourth month of the worker’s services for the employer. This is equivalent to 45 days’ salary for the first year of services and 60 days’ salary for each subsequent year. In addition, the employer is obliged to pay two additional days’ salary per year, starting in the second year, up to a maximum total of 30 additional days (the supplementary seniority payment). Thus, a worker may accrue up to 90 days’ seniority payment per year upon completing 16 years of service.

The seniority payment shall be paid in the specific year that employment ends in the following manner: (a) if termination occurs when the worker has seniority of more than three months but less than six months, the employer must pay the difference not yet credited or deposited, up to the equivalent of 15 days of salary; (b) if termination occurs when the worker has more than six months’ seniority but less than one year of seniority, the employer must pay the difference not yet credited or deposited, up to the equivalent of 45 days of salary; and (c) if termination occurs when the worker has seniority of more than one year, the employer must pay the difference not yet credited or deposited, up to the equivalent of 60 days of salary for that year, provided that the worker had worked for at least six months during that year.

A major problem for companies under the former system was that the actual and final cost of the indemnities were only realized when the employment relationship was terminated, because the calculation was based on the last salary earned. The system also impaired the worker because employers refrained from granting major salary increases due to the impact they would have on labor indemnities. The current system corrected these problems by establishing a scheme whereby employers know and can forecast the labor cost, and workers have access to better compensation increases.

However, one of the transitory provisions of the Constitution of December 30, 1999, requires that the OLL be modified in order that seniority payment be calculated according to the worker's last salary and based on his or her years of service. This leads to a presumption that Venezuela could return to a system similar to that existing prior to the 1997 labor law reform.

Terminations

Admitted Forms Of Termination

Individual employment relationships may be terminated in Venezuela by either:

(i) the employer's unilateral decision (or dismissal), which in turn may be for cause or for no cause; (ii) the worker's unilateral decision (or resignation), which in turn may be for cause or for no cause; (iii) mutual agreement between the parties; and (iv) for causes beyond the parties' will, such as death or permanent disability of the worker, acts of God and force majeure. Temporary employment relationships, such as those arising from employment agreements for a specific work or for a stated term, automatically terminate upon completion of the work or the lapse of the term.

Dismissal With Cause

The dismissal of a worker will only be deemed to be with cause when it is based on any of the following causes set forth in Article 102 of the OLL:

- (i) Dishonesty and immoral behavior at work;
- (ii) Violence, except in case of legitimate defense;
- (iii) Insults or serious disrespect and lack of consideration due to the employer, his or her representatives or members of his or her family living with him or her;

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- (iv) Willful act or serious negligence that affects the safety and hygiene of work;
 - (v) Omissions or imprudence that seriously affect the safety and hygiene of work;
 - (vi) Three business days unjustified absence from work in one month;
 - (vii) Material damage, whether intentional or through gross negligence, to machinery, tools and work utensils, company furniture, raw materials or finished or unfinished products, plantations and other assets of the employer;
 - (viii) Disclosure of manufacturing or procedural secrets;
 - (ix) Serious breach of the obligations imposed by the employment relationship; and
 - (x) Abandonment of work (as defined in the OLL).

The Regulations to the OLL provide that it shall be considered a breach of the obligations imposed by the employment relationship for the worker to arrive late for work four times in one month.

Other causes for dismissal are established in specific laws, like the Law against the Illegal Traffic and Consumption of Stupeficient and Psychotropic Substances.

Justified Worker's Resignation/Constructive Dismissal

The worker may terminate his or her employment relationship with cause when the employer is liable for any of the following faults contemplated in Article 103 of the OLL:

- (i) Dishonesty;
- (ii) Any immoral act that offends the worker or members of his or her family living with him or her;
- (iii) Violence;
- (iv) Insults or serious disrespect and lack of consideration due to the worker or members of his family living with him or her;
- (v) Omissions or imprudence that seriously affect the safety or hygiene of work;
- (vi) Any act that is a serious breach of the obligations imposed by the employment relationship; and

(vii) Any act that constitutes a constructive dismissal.

According to the OLL, the following are deemed circumstances for constructive dismissal:

- The employer's demand that the worker perform a type of work that is overtly different from that which he or she is obliged to perform under contract or by law, or which is not compatible with the worker's dignity or professional capacity, or that the worker render his or her services under conditions that imply a change of residence when this was not agreed upon in the contract, except when the nature of the work implies successive changes of residence for the worker or if the change is justified and does not cause any impairment to the worker;
- A salary reduction;
- Transferring the worker to an inferior position;
- Arbitrary change in the work schedule; and
- Other similar events that alter the existing work conditions.

To the contrary, the following will not be deemed to be constructive dismissal:

- Returning the worker to his or her primary position, after being subject to a trial period in a higher position. In this case, the trial period cannot exceed 90 days;
- Returning the worker to his or her primary position after having performed, on a temporary basis and for a term not exceeding 180 days, a higher position due to absence of the person holding such position; and
- The temporary transfer of a worker, in case of emergency, to an inferior position within his or her own occupation, and with his or her previous salary, for a term not to exceed 90 days.

Restrictions On Employers

Mass Dismissal

The OLL forbids mass dismissals. According to Article 34 of the OLL, a dismissal is deemed to be a mass dismissal when it affects 10% or more of the workers in a

company with more than 100 workers, 20% or more of those in a company with 50 to 100 workers, or 10 or more workers in a company with fewer than 50 workers, within a term of three months or a longer period if, in the opinion of the Labor Ministry, the circumstances are critical. The Labor Ministry can suspend mass dismissals and order the reinstatement of dismissed workers with payment of their back salaries. If there are economic or technological reasons forcing an employer to reduce its personnel, the employer could try to negotiate such a reduction with the workers' union, in the presence of the Labor Inspector.

Bar Against Dismissal

There are certain cases when workers cannot be dismissed, not even by paying them additional compensation, unless their dismissal has been previously authorized by the Labor Inspector through a special procedure established for this purpose, in which the employer must prove the worker's fault or breach. Workers who enjoy this special protection or "bar against dismissal" are, among others, the following:

- (i) Workers who are promoting the legalization of a workers' union;
- (ii) Workers who join a union that is being formed;
- (iii) Members of the board of directors of the workers' unions (the number of protected workers varies according to the size of the company);
- (iv) All interested workers, during their unions' election processes;
- (v) All workers interested in the negotiation of the collective bargaining agreement, while the same is being discussed and for up to a maximum of 270 days;
- (vi) All workers interested in a collective labor conflict, while the same is conducted;
- (vii) Workers who have been elected as Prevention Delegates for occupational health and safety purposes;
- (viii) Workers whose employment relationship is temporarily suspended for a lawful cause, such as a sickness or accident, compulsory military service and preventive police detention, among others;
- (ix) Pregnant women; and
- (x) Male and female workers for one year after becoming parents or adopting a child of less than three years of age.

There is also a special bar against dismissal implemented through a decree issued by the National Executive. This special protection was originally enforced during the second quarter of 2002, and since then it has been continuously extended to date. With respect to the private sector, it currently protects all workers except for: (i) workers of trust (“*trabajadores de confianza*”); (ii) upper management employees (“*empleados de dirección*”); (iii) those who have less than three months of service; (iv) temporary, eventual and occasional workers; and (v) those workers whose monthly base salary, by the date of the decree providing for this protection, was higher than the equivalent to three minimum monthly wages. The special bar against dismissal is set to be valid, unless further extended, until December 31, 2008.

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

Dismissal With Cause

The employer has a term of 30 consecutive days to dismiss the worker from the time it became, or should have become, aware of the fault. Failure to do so will result in the fault being deemed forgiven and entitlement to dismiss with cause will cease. The employer must duly notify the competent labor court regarding any justified dismissal within five business days of the date of the dismissal, otherwise the dismissal in principle will be deemed to be unjustified.

Justified Worker’s Resignation / Constructive Dismissal

Any worker who decides to resign with cause may do so within a term of 30 consecutive days after the date on which he became, or should have become, aware of the employer’s fault, otherwise such fault shall be deemed to be forgiven. A worker who resigns with due cause is entitled to the same indemnities as set forth in the OLL for the cases of unjustified dismissal.

Dismissal For No Cause

Workers who enjoy job stability:

If the worker has been employed for more than three months and is not an upper management employee, the worker enjoys job stability. In this case, the indemnity in lieu of advanced notice of termination is provided in Article 125 of the OLL and it is equivalent to:

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- (i) 15 days' salary if the term of service is more than one month and up to six months;
 - (ii) 30 days' salary if the term of service is more than six months but less than one year;
 - (iii) 45 days' salary if the term of service is equal to or greater than one year, but less than two years;
 - (iv) 60 days' salary if the term of service is equal to or greater than two years, but not more than 10 years;
 - (v) 90 days' salary if the term of service is more than 10 years.

This indemnity is paid on the basis of the salary earned by the worker at the time of termination of the employment relationship; however, for this purpose such salary cannot exceed the equivalent of 10 minimum monthly salaries.

Workers who do not enjoy job stability:

If the worker is an upper management employee or does not otherwise enjoy job stability under the OLL and is dismissed with no cause, the worker will be entitled to receive a notice of termination provided for in Article 104 of the OLL, as follows:

- (i) One week of advance notice of termination if the term of service is more than one month and up to six months;
- (ii) 15 days of advance notice of termination if the term of service is more than six months and up to one year;
- (iii) One month of advance notice of termination if the term of service is greater than one year and up to five years;
- (iv) Two months of advance notice of termination if the term of service is greater than five years and up to 10 years;
- (v) Three months of advance notice of termination if the term of service is more than 10 years.

If notice of termination is omitted, the employer shall pay the salary and benefits (such as seniority payment, vacation, vacation bonus, profit sharing) that the worker would have earned had he continued to work for the employer during the applicable termination notice period.

Termination Indemnities

Dismissals for no cause generally trigger the obligation by the employer to pay the following items to the affected worker:

- (i) Unused vacation days (plus rest days and holidays that would be included in each vacation term) and their corresponding vacation bonus(es) [*“vacaciones no disfrutadas y sus bonos vacacionales”*];
- (ii) Pro-rated or fractional vacation days and vacation bonus [*“vacaciones y bono vacacional fraccionados”*], based on the number of months of services performed during the employment year in which termination takes place;
- (iii) The accumulated seniority payment and the supplementary seniority payment [*“prestación de antigüedad y la prestación de antigüedad complementaria”*].
- (iv) Earned or pro-rated profit sharing [*“utilidades devengadas o fraccionadas”*];
- (v) Indemnity in lieu of advanced notice of termination, and
- (vi) The applicable unjustified dismissal payments or indemnities.

Workers who enjoy job stability:

They are entitled to receive, in addition to the indemnity in lieu of advanced notice of termination, an indemnity for unjustified dismissal provided in Article 125 of the OLL.

The indemnity for unjustified dismissal is equivalent to:

- 10 days’ salary if the term of service is more than three months but does not exceed six months;
- 30 days’ salary per each year of service or fraction of a year greater than six months, up to a maximum of 150 days’ salary.

This indemnity is paid on the basis of the salary earned by the worker at the time of termination of the employment relationship.

Workers who do not enjoy job stability:

They are only entitled to receive the notice of termination provided for in Article 104 of the OLL.

Benefits described before under (i), (iii) and (iv) are payable to the worker in all cases of termination of his or her employment relationship, regardless of its cause, because they are considered “vested rights.”

Laws On Separation Agreements, Waivers And Releases

As a general rule, workers cannot waive their rights. However, it is possible to enter into individual labor settlements to resolve any differences existing between an employer and a worker. To be valid, a labor settlement must be made in writing, setting forth a detailed description of the facts that motivate it and the rights included therein. It must be executed before the competent labor official (Labor Inspector or Labor Judge) after the employment relationship has terminated. Agreements related to occupational accidents or illnesses additionally require that the amount of the settlement be equal to or higher than the amount previously set forth in an expert report issued by the National Institute for Occupational Prevention, Health and Safety (INPSASEL).

Employment Discrimination

Laws On Employment Discrimination

The 1999 Constitution forbids any discrimination based on race, gender, creed or social status or seeking to cancel or impair the recognition, enjoyment or exercising, in equal conditions, of the rights and freedom of any person.

The OLL and its regulations forbid any discrimination regarding work conditions based on age, gender, sexual preference, race, marital status, religion, political affiliation, social status or any other criteria not compatible with the legal system. However, the OLL makes clear that the special provisions issued to protect maternity and family are not deemed to be discriminatory, nor are those designed to protect minors, the elderly and disabled persons. In particular, Article 394 of the OLL provides that there cannot be differences between the salary of a female worker who is pregnant or breastfeeding and that of other workers who perform similar tasks in the same organization.

Finally, Article 14 of the Regulations to the OLL makes it clear that arbitrary discrimination is not deemed to exist when workers are granted preferences or privileges based on relevant criteria that are consistent with the legal system, such as professional training, productivity, attendance at work, years of service, prudent use of raw materials, dependent family members, union membership and other similar circumstances, provided such preferences or privileges are of a general nature throughout the company.

Potential Employer Liability For Employment Discrimination

A worker who is subject to discrimination may elect either to:

- (i) Extinguish the employment relationship by invoking a just cause for resignation, in which case the employer is obliged to pay the same indemnities due in the event of an unjustified dismissal; or
- (ii) File an action for constitutional protection for reinstatement of the infringed legal situation.

Sexual Harassment

Laws On Sexual Harassment

Sexual harassment is regulated in the Organic Law on the Right of Women to a Life Free from Violence and, with specific reference to the workplace, in the Regulations to the OLL.

Generally, sexual harassment in the workplace occurs when a person seeks sexual favors or responses for him or her or for a third party, or tries to impose an undesired sexual proximity through his or her higher labor rank, with the express or tacit threat of this having an effect on the victim's working conditions.

Sexual harassment is deemed to be a crime, and the aggressor (not the employer) will be penalized with one to three years' imprisonment. An employer who is aware of sexual harassment in the workplace must take action to correct the situation and prevent its recurrence. Failure to take such precautions will result in the employer being subject to fines ranging from 50 to 100 Tax Units.

Potential Employer Liability For Sexual Harassment

A worker who is the victim of sexual harassment may elect either to:

- (i) Extinguish the employment relationship by invoking a just cause for resignation, in which case the employer is obliged to pay the same indemnities due in the event of an unjustified dismissal; or
- (ii) File an action for constitutional protection for reinstatement of the infringed legal situation.

Furthermore, a female victim of sexual harassment in the workplace may claim from the aggressor a sum equal to double the amount of damages suffered for failing to obtain the job, position or promotion to which she aspired, or due to the obstacles encountered in her performance. If monetary damages cannot be determined, an indemnity of between 100 and 500 Tax Units will be fixed by the judge.