

Chile

Introduction

The National Constitution and the Labor Code guarantee the right to form labor organizations without employer or government interference. Membership in Trade Unions is voluntary. More than one union is permitted in the same workplace. Employees may belong to only one Trade Union for each job that they hold. Employees may not be required to join a union as a condition of employment. Laws enacted during the military regime in Chile somewhat diluted the power of Trade Unions by restricting their ability to bargain collectively on an industry wide or area wide basis, but the trend of labor legislation in the 1990s has been to strengthen union bargaining power. Collective bargaining on an area wide basis is an issue prompting bitter debate in the National Congress. As a practical matter, however, union power remains limited, and as of 1994, the percentage of nonagricultural workers represented by unions was a relatively small 16%. Union-represented employees are found primarily in mid-sized to large companies. In small companies, union representation is rare. Trade Unions and labor relations are overseen by the Ministry of Labor, and Social Security through the local Labor Inspectorates.

Trade Unions

Types Of Unions

Chilean law recognizes seven types of unions:

- Enterprise unions (all members are employees of the same employer);
- Inter-enterprise unions (members are employees of two or more employers);
- Unions of self-employed workers;
- Unions of temporary workers;
- Federations;
- Confederations; and
- Workers' centrals.

The General Role Of Trade Unions

Under Chilean law, the purposes of Trade Unions include the following:

- To provide mutual assistance to union members, to represent workers in collective bargaining;
- To promote education and workplace security;
- To monitor employer compliance with employment legislation and social security;
- To provide various nonprofit services, including humanitarian services, for union members; and
- To represent workers in the exercise of their contractual rights.

Constitution Of The Trade Union

The unionization of employees in Chile is quite different from the process of unionization in the United States. Unlike unions in the United States, where a union is certified to represent all employees in a defined bargaining unit regardless of whether they are members of the union, in Chile, unions represent only those employees who are members. Thus, more than one union is permitted in the same workplace.

When a sufficient number of employees become members of a union at a particular company, a union is “formed” in that workplace and may negotiate with the employer for a collective labor contract covering its members. Recent amendments to the Chilean Labor Code implemented changes that make it much easier for unions to organize and represent employees, such as:

- In companies with 50 or fewer employees, a union may be formed with at least eight employees, regardless of the percentage of employees represented.
- In companies with more than 50 employees, a union may be formed with at least 25 workers joining within one year of its creation, provided that this represents at least 10% of the employer’s workforce. When an employer maintains multiple places of business, a union may be formed with at least 25 workers at each site, provided they represent at least 30% of the employees at each location.

- In companies with 250 or more employees, a union may be formed regardless of the percentage of employees represented.

These numerical restrictions do not apply to inter-enterprise unions and unions of self-employed workers, which are formed when they have at least 25 members, regardless of where those employees are employed.

The required number of employees must undergo specific formalities contemplated under the law. The formation of a union is a matter left entirely to the discretion of employees. An employer may neither interfere with its employees' right to form and join a union nor require employees to form or join a particular union. Chilean law establishes a right on the part of each employee to join, refrain from joining, or withdraw membership from any union or labor organization, and membership in a union cannot be required as a condition of employment. A union may not engage in a strike or other economic pressure against an employer while organizing the employer's employees. If organizing efforts fail, neither the union nor the employees must wait any prescribed period of time before again attempting to organize employees at the establishment.

The Labor Code does not provide a specific procedure by which an employer, an employee, or another union may challenge the formation of a union. The Labor Code does, however, authorize the Labor Inspectorate to object to the formation of a union during a 90-day period following the purported creation of the union.

The Scope Of Trade Union Rights In Businesses

Time For Performance Of Union Business

Weekly Leave

Union directors are entitled to six hours of leave per week to perform union business. If the union has 250 or more members, the leave may be increased to eight hours per week. The director's leave may accumulate within a calendar month.

Annual Leave

Union directors receive an additional week of leave each year for necessary union business. A director may also go on leave for anywhere between six months and the term of the contract if the union so decides in accordance with the union by-laws.

A director of an inter-enterprise union may receive leave of one month for collective bargaining. Directors of federations and confederations may receive leave for the entire term of their mandate and for one month after its expiration.

Payment for Leave

Time spent on leave is considered hours worked, but the wages for these hours are paid by the union. While the employer must preserve the union director's job during leave, it may fulfill this obligation by giving the director an equivalent job upon return from leave.

Collective Bargains

The Duty To Bargain

Generally, an employer has a duty to bargain with any union of its employees that has met the legal requirements for establishing a union. However, employers that have been in operation for less than one year and employers with fewer than eight employees are exempted from collective bargaining. In addition, the following classes of employees are not entitled by law to engage in collective bargaining, although they may form or join a union:

- Apprentices;
- Employees hired for a particular task; and
- Temporary employees.

An employment contract may also exempt the following employees from bargaining, although they, too, may join or establish a union:

- Managerial employees;
- Employees authorized to hire or fire employees; and
- Upper-level employees with decision-making authority as to policies or processes of production or commercialization.

If the employment contract of an individual employed in one of these categories does not expressly exclude the individual from collective bargaining, the individual is presumed to be eligible to participate in and benefit from collective bargaining.

Subjects Of Bargaining

In general, collective bargaining covers matters concerning compensation and working conditions. The parties may not negotiate any waiver or modification of the employees' minimum legal rights, nor may the parties negotiate limits on the hiring of nonunion workers. The parties may not negotiate limits on management's right to administer and organize the company, including the use of machinery and the various forms of production, nor may the parties negotiate any matters that are unrelated to the company. Union security clauses, such as provisions requiring union membership as a condition of employment or requiring employees to join the union within a certain time period after being hired, are not permitted.

Level Of Bargaining

Although Chilean law generally restricts the scope of collective bargaining to a single employer and its unions, collective bargaining may take place on a multi-employer or multi-union level as agreed to by the parties. Collective bargaining negotiations between an employer and all of the unions or bargaining groups representing its employees take place at one time, unless the parties agree to separate negotiations. When multiple unions represent various groups of employees at an employer's establishment, the unions may choose to present a common proposal for a collective bargaining agreement to the employer, or they may present multiple proposals, each covering one or more of the unions or bargaining groups.

Bargaining Procedure

Formal collective bargaining, which may be carried out at the enterprise level or at multi-enterprise levels, is called regulated bargaining (*negociación reglada*) and is a highly detailed procedure established by statute. The collective bargaining process begins with the submission of a proposal for a collective contract (*contrato colectivo*)—as opposed to a collective agreement—by a union or bargaining group. The Labor Code establishes a 45-day period for collective bargaining, and during this period the employer is expected to respond to the initial proposal. If the employer does not respond at all within 20 days, it is deemed to have accepted the proposal. Any agreement that the parties reach becomes the exclusive contract between the parties and must remain in effect for at least two years. At any time during collective bargaining negotiations, the parties may agree to appoint a mediator to aid the negotiation process. Arbitration is also available as a means by which parties to collective bargaining negotiations can resolve their differences and reach an agreement.

Informal or nonregulated bargaining may be initiated at any time by the parties and is not regulated by Chile's formal bargaining statutes. Employees who are precluded from regulated collective bargaining (for example, temporary employees) can engage in nonregulated collective bargaining, but this process is also available to all employees. When nonregulated collective bargaining fails to result in an agreement, however, the employees may not lawfully engage in a strike. When nonregulated collective bargaining is successful, the resulting agreement is called a "collective agreement" (*convenio colectivo*) and is governed by the same norms and formal requirements that apply to collective contracts established through regulated bargaining.

Strikes And Lockouts

Strikes

When the parties to regulated collective bargaining negotiations are unable to reach an agreement, the only economic weapon available to the employees is the strike. Any other activities the employees may undertake to pressure the employer into accepting their proposal (for example, picketing, work slowdowns, or secondary boycott activity) would be illegal. In nonregulated bargaining, strikes are illegal.

A strike may not be called during the term of a collective contract. Consequently, a no-strike clause is superfluous in a collective contract. Even when no collective contract is in effect, a strike is legal only when it is called in furtherance of lawful regulated collective bargaining demands. Strikes in protest of unfair labor practices are unlawful at all times. A strike may be called only upon a majority vote of the union members or bargaining group, as the case may be.

A strike suspends the individual employment contracts of strikers and suspends both the striker's duty to work and the employer's duty to pay the strikers. Once a strike begins, the employer may hire temporary replacement employees, provided that the employer's final offer to the union was timely made (that is, presented to the union at least seven days before the end of the 45-day negotiating period), was at least equal to the prior working conditions, and included a pay raise equal to at least 100% of the increase in the cost of living with future pay tied to increases in the Consumer Price Index. If the employer's offer does not meet these conditions, the employer can hire temporary replacements only after the strike has gone on for 15 days. The parties to a strike may appoint an arbitrator at any time to settle their differences.

Once employees go on strike, they do not have an unfettered right to return to work at will. Instead, the law imposes restrictions on their individual ability to abandon the strike and return to work. If the employer complies with the rules governing replacement employees, the strikers may return to work 15 days after the strike begins. If the employer does not so comply, the strikers may return to work 30 days after the strike begins or 15 days after the submission of the employer's final offer, whichever comes first. Strikers who return to work must do so under the terms of the employer's last offer. If more than 50% of the strikers return to work, the strike is terminated, and the remaining employees must also return within two days. If the remaining strikers fail to return to work within that time period, the employer may terminate them for abandoning their jobs, a reason that will disqualify the employees from receiving the statutorily required severance indemnity.

Provided an employer complies with the rules governing replacement employees, including payment of the replacement fee referenced above added by 2001 amendments to the Chilean Labor Code, strikers may return to work 30 days after the strike commences.

Lockouts

A lockout is defined as the employer's right to prohibit employee access to its premises in case of a strike. A lockout bars plant access not only to striking employees, but to all employees in the plant other than management, persons with the power to hire and discharge employees, and high-ranking personnel with decision-making authority over company policies and procedures. A lockout may be declared only if more than 50% of the employees at the affected location are on strike or if the strike threatens to endanger activities that are essential to safeguard the functioning of the business. A lockout suspends the collective or individual labor contract of the affected employees, but the employer must pay the pension and social security payments of all employees not on strike who are affected by the lockout. When a lockout occurs, it must terminate at the same time as the strike or on the thirtieth day after the strike began, whichever occurs first. Thus, if the strike continues after 30 days of lockout, the employer must terminate the lockout at the end of the 30-day period and reopen the plant. This situation rarely arises, however, because private-sector strikes in Chile seldom last more than 15 days.

Trade Union Employee Protection Rights

Employees Protected

The legal doctrine called the *fuero* protects some union members from termination of employment in certain circumstances. The *fuero* extends to the following:

- Candidates for a union director position, beginning from the time the election date is set until the election is completed, but not to exceed 15 days;
- Union directors and directors of federations, confederations, and workers' centrals during their terms of office and for six months thereafter;
- Employees involved in collective bargaining during the period starting 10 days before bargaining begins and ending 30 days after bargaining is completed; and
- Staff delegates during their terms of office and for six months thereafter.

Wrongful Dismissal Based On Anti-Union Animus

In addition to increasing penalties for unjustified dismissal generally, the 2001 amendments to the Labor Code also created a new legal claim for wrongful dismissal based on anti-union animus. Pursuant to these provisions, the worker may have the option of reinstatement or receiving an expanded severance payment. In the event a Labor Court determines that an employer unlawfully terminated an employee based on union animus, the employer may be ordered to pay the employee between 3 and 11 times his or her salary in addition to any severance otherwise due.

Other Types Of Employee Representation

Employees who do not wish to form a union may nonetheless elect a representative, known as a "staff delegate." The employees who wish to be represented by a staff delegate must fulfill the representational requirements applied to enterprise unions (i.e., numerosity and representative status) and must not be affiliated with any union. Like union directors, staff delegates serve two- to four-year terms and are the means of communication and negotiation between the represented employees and the employer. Staff delegates may also represent their workers before government labor authorities. Employees who elect a staff delegate must submit the delegate's name to the employer, along with the names and signatures of all represented employees.

During their term of office, staff delegates receive the same employment protections afforded to union directors, including protection under the *fuero*. The *fuero* covers staff delegates during their terms of office and for six months thereafter.

Employer Organizations

Employers may form their own organizations, also known as “craft associations” (*Asociaciones Gremiales*), for the purposes of undertaking common activities and providing mutual aid within the area of the employers’ commercial activity. Craft associations do not represent their members in collective bargaining with unions. Craft associations also may not engage in political or religious activity, but do represent their members in discussions with governmental agencies and the National Congress to promote economic and labor policies favorable to their members’ interests. Matters that a craft association may address include tax policies, import and export regulations, foreign currency policies, and labor laws. These organizations must register with the Ministry of Economy, Development, and Reconstruction (*Ministerio de Economía, Fomento y Reconstrucción*) and may also form federations and confederations.

Unfair Labor Practices

Chilean law identifies certain unlawful acts constituting unfair labor practices. Unfair labor practices include acts committed by unions and employees as well as those committed by employers. Charges of unfair labor practices are heard by the Labor Courts, which have the power to punish violators by imposing a fine. The Labor Directorate maintains a register of unfair labor practice violators and periodically publishes a list of repeat offenders.

Unfair Labor Practices Committed by Employers

An employer commits an unfair labor practice if it:

- Offers special payments or benefits to employees or exerts other pressure to prevent their joining a union;
- Discriminates among workers for the purpose of discouraging union membership or requires an employee to join a union as a condition of employment;
- Uses moral or physical coercion to induce an employee to join or resign from a Trade Union or if it interferes with free speech among union members;

- Refuses to bargain with a certified union;
- Refuses to provide necessary information to a union;
- Interferes with the establishment of a union by threatening to reduce wages or benefits or to close the facility, or to manipulate the number of employees in the work force to prevent or interfere with the formation or maintenance of a union;
- Interferes in a union's affairs, arbitrarily discriminates between Trade Unions, or requires an employee to join a union or to authorize wage deductions for union dues as a condition of employment; or
- Fails to provide certain financial information to unions to facilitate bargaining. Failure to do so is now an unfair labor practice remediable through the Labor Courts.

Unfair Labor Practices By Unions And Employees

Unions or employees commit an unfair labor practice if they

- Conspire with an employer to help the employer commit an unfair practice;
- Conspire with the employer to terminate or discriminate against an employee for nonpayment of union dues or fines, or if they exert pressure on an employer to perform any of these actions; or
- Use moral or physical coercion to induce an employee to join or resign from a Trade Union, or if they interfere with free speech among union members.

Unions or employees also commit an unfair labor practice if they

- Disclose an employer's confidential information to third parties; or
- Interfere with an employer's right to choose its representatives for collective bargaining.

It is an unfair labor practice for a union to fine a union member for not obeying an unlawful union decision or for bringing charges against or testifying against the union. A union officer who ignores a member's complaint or claim also commits an unfair labor practice.