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KLA



Francisco Peniche
www.creel.mx
francisco.peniche@creel.mx
+52 55 4748 0670

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7 Employment Matters To Look Out For When Doing Business In Mexico

By Francisco Peniche

1. **Protection of Employees.**

Labor and employment relationships in Mexico are mainly ruled by Article 123 Section A of the Mexican Federal Constitution, and the Federal Labor Law ("FLL") which regulates such constitutional Article.

Both pieces of legislation are the result of the Mexican Revolution, and are based on a principle intended to protect the working class which was subject of constant abuse from employers. Such principle is clearly reflected in Article 18 of the FLL, which states that "*…in case of doubt, the interpretation most favorable to the employee must prevail*".

The general principle ruling the employment relationships in Mexico is the employment stability, which means that the employment relationship cannot be terminated under the employer's will unless the employee incurs in one or more of the specific causes for termination foreseen in the FLL.

Another example of the protection principles granted to employees in the FLL is the recognition of acquired rights principle. In this regard, employees cannot waive their employment benefits and rights, whereas employers are not legally entitled to modify them if such change is in detriment of the employees.

In this respect, if employer either terminates the employment relationship without a just cause or modifies any employment benefits, employees would be entitled to severance payment.

2. **Severance payment.**

Under the FLL, when employers terminate an employee without a just cause, or when employees terminate the relationship with cause, employees are entitled to severance payment, which consists of:

a) Three months of total daily compensation;
b) 20 days' total daily compensation per year of services;
c) Seniority premium, equal to 12 days' salary per year of services (the salary used to calculate this concept is capped to two times the minimum daily wage[1]); and
d) Unused, accrued benefits.

Total daily compensation is comprised by all the payments made by the employer to the employees in exchange for their work in the prior 12 months from termination date.



3. **Employment Relationships and Employment Contracts.**

The FLL provides that an employment relationship exists whenever the following essential elements are present: (i) Rendering of a personal service; (ii) Subordination in the services; and (iii) Payment of compensation.

In terms of the above, an employment relationship will exist whenever an individual renders a personal service to another individual or corporation, under the latter's control and subordination in consideration for the payment of an economic compensation, even if the parties have agreed to other type of relationship (i.e. contractor, commissioners, etc.).

Whether an individual is considered to have an employment relationship is a question of fact left to Mexican courts and the type/nature of agreement executed between the parties will not lead such interpretation, but rather whether the above described elements exist in such relationship.

Notwithstanding, the lack of a document containing the terms and conditions of employment does not deprive employees of receiving, at a minimum, the statutory rights and benefits granted by the FLL. A consistent interpretation of the Mexican legal framework concludes that the execution of individual employment contracts is an obligation for employers in Mexico.

The general rule in Mexico is that employment relationships are regarded for an indefinite term unless otherwise stipulated. In addition to the indefinite term relationship/agreement, employers can hire employees: (i) for a fixed term, (ii) for a specific task, and (iii) for initial training. With respect to the indefinite term, there is also the possibility to work on a discontinuous manner (season mode). The difference between the employment relationship for an indefinite term and the rest is how such relationships are terminated, taking into consideration that the indefinite relationship can be terminated by the employer under any of the causes set forth in the FLL.

Recent amendments to the FLL allow the possibility to include a trial period in employment relationships with duration of a minimum of 180 days. Trial periods have to comply with specific terms and conditions foreseen in the FLL.

4. **Profit Sharing.**

Employers in Mexico are obligated to distribute a percentage of their profits among the employees that worked during the fiscal year in which the profits were generated. Profits are defined as the taxable income of a company, in accordance with the provisions of the Mexican Income Tax Law. The percentage of the employer's profits to be distributed among the employees currently represents 10% of the company's taxable income.

Profits to be distributed among eligible employees are divided in two parts: i) one that takes into account the number of days worked by each employee during the year, irrespective to the amount of each employees' salary; ii) and the other in proportion to the total sum of the compensation earned irrespective of the days worked during the year.

The FLL foresees counted exceptions for Profit Sharing, both for employees depending on factors such as the position they hold within the company; and for companies, according to the activities they perform and years of operations.

5. **Employment Benefits.**

The FLL sets forth statutory, minimum benefits that all employees must receive in exchange for their work: (i) Christmas bonus, (ii) vacation days, and (iii) vacation premium. Notwithstanding, employers may grant employees with either higher amounts than the statutory or extra-legal benefits. However, once these benefits are granted, they are considered acquired rights, and the employers are not entitled to either reduce or remove them.

6. **Unions.**

The FLL recognizes the freedom of association of employees and employers, and defines "association" as a temporal agreement among a group of employees or employers for the defense of their common interests. For this purpose, employers and employees may enter into a collective bargaining agreement ("CBA"), in order to establish the terms and conditions under which the activities will be performed at the workplace.

The CBA must be formalized in writing and filed with the competent Conciliation and Arbitration Board, taking effect from the date and time of its filing, unless the parties have agreed otherwise. In addition, CBAs must be revised annually with respect to salaries and every two years with respect to the general terms and conditions of employment.

Absence of a CBA at the workplace puts the company at risk of being subject to a strike call from an alien, hostile union in order to claim the execution of a CBA under their own terms and conditions.

7. **Social Security.**

Pursuant to the FLL, one of the purposes of labor and employment-related regulations is to foster dignified or decent work, which is characterized by, among others, access to social security. To that end, the referenced ordinance seeks to guarantee employees' rights to social security.

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Employers have the obligation to be registered and enroll their employees with the social security authorities, such as the Mexican Social Security Institute (Spanish acronym *IMSS*), National Housing Fund for Workers Institute (Spanish acronym *INFONAVIT*) and National Consumption Fund for Workers Institute (Spanish acronym *INFONACOT*). Likewise, employers have the obligation to pay the corresponding social security contributions in order for the employees to access to the social welfare benefits, such as medical and hospital care, nursing, retirement and pension benefits, and financial assistance for employees to purchase comfortable and hygienic housing, as well as to build, repair or make improvements to their home.

Employers who fail to comply with these obligations not only would be liable to pay the omitted contributions, but fines, surcharges and arrears as well.

1. For 2016, the minimum daily wage in Mexico is MXN $73.04, approximately USD $4.20 Dollars.

Francisco Peniche *is a partner with Creel, García-Cuéllar, Aiza y Enríquez, S.C., in Mexico City, where he heads the Labor and Employment practice area. He advises clients on labor and employment matters, including but not limited to hiring, transfer and termination of executives, employment matters related to corporate transactions, reorganizations and negotiation and execution of collective bargaining agreements. He also represents clients in major downsizings and was recently engaged for several opinions in connection with the application of Data Privacy laws to employers in Mexico.*

His recent experience includes representing 4 Finance, a leader in digital consumer finance, in the analysis and implementation of their labor and employment structure in Mexico; the Canadian Government through the Canadian Embassy in Mexico in the individual employment litigation filed against the Embassy in Mexico; Bostik Mexicana, a subsidiary of Bostik, a leading global adhesive specialist in industrial manufacturing, construction and consumer markets, on all of their labor and employment matters; Coexpan, manufacturer of rigid plastic sheets that provides solutions to packaging industry, in their RIF and employment restructure in Mexico.

Francisco has authored several articles in specialized publications for international companies and has been guest speaker in local and foreign seminars on labor and employment law and data privacy implications in employment relationships. Francisco has been recognized by Chambers and Partners Latin America 2016 and is ranked in the Labor and Employment practice area.