Employment and Employee Benefits in Mexico: Overview

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A Q&A guide to employment and employee benefits law in Mexico.

This Q&A gives a high-level overview of the key practical issues including: the scope of employment regulation; employment status; background checks; regulation of the employment relationship (including unilateral changes by an employer to the terms and conditions of employment); minimum wage and bonuses; working time, holidays and flexible working; illness and injury of employees; rights created by continuous employment; provisions for fixed-term, part-time and agency workers; discrimination and harassment; termination of employment (including protection against dismissal and protected employees); resolution of disputes between an employee and employer; redundancy/layoff; employee representation and consultation; consequences of a business transfer; employer and parent company liability; employer insolvency; employers' health and safety obligations; taxation of employment income; intellectual property; restraint of trade; relocation of employees; and proposals for reform.

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Resource Type
Country Q&A

Jurisdiction
Mexico

Scope of Employment Regulation

1. Do the main laws that regulate the employment relationship apply to:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Laws Applicable to Foreign Nationals

Employment rights provided by the Constitution of the United Mexican States (*Constitución Política de los Estados Unidos Mexicanos*) (Constitution) and the Federal Labour Law (FLL) will apply to anyone rendering personal "subordinated" services in Mexico, including foreign nationals, even if the parties agree to the application of the law of another jurisdiction or another type of relationship in the corresponding agreement. These rights include:

- Employment benefits, for example:
    - Christmas bonus (*aguinaldo)*;
    - vacations; and
    - vacation premium (an amount paid to an employee on top of the employee's regular pay for vacation days).

- Working conditions, for example:
    - maximum working schedule;
    - weekly day of rest (rest period); and
    - statutory days of rest (public holidays).
- Payment of employees' profit-share.
- Protection against dismissal.

Employment rights in Mexico are inalienable. Therefore, foreign nationals rendering personal subordinated services in Mexico will be entitled to Mexican employment rights regardless of any choice of law clause included by the parties in their employment agreement, and even where employees waive their entitlement to these rights. Due to a long history of social struggle in Mexico, the FLL and Mexican labour courts are very protectionist of employees. In this regard, the FLL specifically provides that in the event of doubt, the most favourable interpretation to the employee must prevail. As a result, any foreign company interested in assigning employees to Mexico is strongly advised to seek independent legal advice to mitigate any potential employment liabilities.

Under Mexican legislation it is possible to engage an individual through different types of relationships such as services providers or commission agents, in which cases Mexican employment rights will not apply in principle. Despite this, under the FLL, whether an individual is considered to be an employee does not depend on the type of agreement executed between the parties but on the existence of the following elements:

- Rendering of a personal service.
- Subordination of the services either by a legal entity or an individual.
- Payment of a salary.

Labour courts can determine the existence of an employment relationship where these elements are present even if the parties have agreed to another type of relationship in the corresponding agreement.

Laws Applicable to Nationals Working Abroad

The FLL is only generally applicable in Mexico. However, the FLL can also govern the employment relationships of Mexican nationals working abroad that:

- Were hired in Mexico.
- Were recruited and selected in Mexico through mechanisms agreed between Mexico and any foreign government.
- Work in ships or vessels with a Mexican flag, regardless of whether the ship is in Mexican territory.
- Were hired by a Mexican employer, whether it was a Mexican individual or legal entity.

Special obligations apply in the above cases which include the following:

- The employer will be liable for the payment of any repatriation expenses.
- The individual employment agreement must be presented to, and approved by, the Mexican labour court.
- If the employer does not have a permanent establishment and fiscal address in Mexico, the employer must pay a deposit to guarantee its compliance with its

obligations and so on.

- Additional obligations may apply depending on the specific case.

The general rule is that Mexican legislation (including the FLL, international treaties executed and ratified by Mexico and any other Mexican laws relating to employment)

will not apply to the employment relationship of a Mexican national hired by a foreign legal entity, provided that the employment relationship does not fit into any of the categories listed above.

Employment Status

2. Does the law distinguish between different categories of worker? If so, what are the requirements to fall into each category, the material differences in entitlement to statutory employment rights and are there any maximum time periods for which each category of worker can be engaged?

Categories of Worker

Employee or Independent Contractor? The FLL distinguishes the following categories of employees:

- **Unionised and Non-Unionised Employees.** The FLL defines unionised employees as those who are members of a legally incorporated union (and not those to whom a collective bargaining agreement (CBA) applies).
- **Trust Employees.** The FLL defines trust employees as those who perform:

    - direction, inspection, vigilance or supervision activities, when such are of a general nature (so that they apply to all the areas of a company); and/or
    - personal services for the employer (so that they are in personal/direct contact with the employer regardless of their position/activities).

    The classification of a trust employee depends on the activities performed and not on the name given to their position.
- **Indefinite Term, Definite Term and Seasonal Employees.** The FLL also classifies employees depending on the term of their employment relationship.
- **Independent Contractor/Self-Employed**. Under Mexican legislation, independent contractors are individuals who render their professional services as contractors, without being subject to subordination. The relationship with independent contractors is of a civil/commercial nature and is ruled by civil/mercantile legislation and does not constitute an employment relationship. As a result, independent contractors are not entitled to benefit from the employment rights provided to employees. However, it is important to note that whether a person is considered to be an employee or an independent contractor is a matter determined by the courts based on the manner in which the services are rendered, irrespective of the title given to the employee or independent contractor, or the type of agreement executed between the employer and the employee or independent contractor.

Entitlement to Statutory Employment Rights

As a general rule, all employees are entitled to the same employment benefits and conditions. Notwithstanding this, the FLL also provides the special rights/conditions described below for the following categories of employees:

- **Unionised Employees.** The highest salary of a unionised employee within an organisation is considered when calculating the formula to be used for the distribution of employees' profit sharing. The FLL provides that in the case of equality of circumstances, employers are to prefer unionised employees against non-unionised ones.
- **Trust Employees.** The FLL provides special obligations/conditions to trust employees rather than granting them additional entitlements. Trust employees:

    - are not entitled to reinstatement to their jobs in the case of termination of their employment relationship;
    - cannot join the same union as non-trust employees; and
    - cannot exercise the right to strike.

    Additionally, the salary of trust employees may be capped when considering the formula to be used for the distribution of employees' profit sharing. Employers can terminate the employment relationship of a trust employee with cause when they have a reasonable justification to lose such trust.
- **Definite Term Employees.** The severance payment to which employees hired for a definite term are entitled in the case of wrongful termination is different to that of employees hired for an indefinite term (in most cases it is higher for definite term employees, but this ultimately depends on the length of the temporary contract).

Time Periods

As a general rule, employment relationships in Mexico are usually for an indefinite term. As an exception, and when the nature of the activities so require, the parties can agree to an employment relationship for the following shorter terms:

- Definite term.
- Employment for a specific task/project.
- Seasonal term.

There is no maximum period for any of these terms of employment, and the term is determined by the nature of the work itself.

In addition to the above, the parties to an employment agreement can also agree to an initial training period, which generally must not exceed 90 days. However, initial training periods of up to 180 days duration can be agreed between the parties for:

- Employees in managerial/direction positions.
- Employees who perform administrative/direction activities of a general nature (that is, that apply to all the areas of the company or establishment).
- Employees who perform specialised technical or professional activities.

Employment relationships for an indefinite term or any other term (except for initial training) exceeding 180 days can be subject to a probation period which, generally, should not exceed 30 days. However, a probation period of up to 180 days can be agreed for the same three scenarios described above (managerial/direction positions, administrative/direction positions of a general nature, or specialised technical or professional activities).

Background Checks

3. Are there any restrictions or prohibitions on carrying out background checks in relation to applicants?

Restrictions/Prohibitions on Conducting Background Checks

The FLL does not regulate the recruiting process, and consequently it does not impose any restriction or prohibition on carrying out background checks on applicants.

However, the Federal Law on the Protection of Personal Data in the Possession of Private Parties (Data Protection Law) imposes a number of requirements in connection with the collection, storage, treatment and transfer of personal information, beginning with the requirement to obtain the consent of the owner of such information (that is, the applicant) to store, treat and transfer the corresponding data. In addition, under the Data Protection Law and the Constitution, employers must not ask questions of an applicant that could result in the applicant being discriminated against unless there is strong justification for asking such questions.

Furthermore, the National Criminal Enforcement Law restricts the issuance of criminal records certifications except for in the specific cases described within that law, which generally excludes background checks.

Background Checks by Third Parties

Additional data privacy implications may also arise where a third party carries out the background checks on the employer's behalf.

Regulation of the Employment Relationship

4. How is the employment relationship governed and regulated?

Written Employment Contract

Employers must execute written individual employment agreements with their employees. Further, the FLL expressly states that employees must be provided with a signed copy of their employment agreement. Individual employment agreements must include information on the following matters:

- Personal information of the employer and the employee.
- Term of the employment relationship and whether it is subject to a probation period.
- Activities to be performed by the employee.
- Place of work.
- Working schedule.
- Salary.
- Training and instruction provisions.
- Employment benefits.
- Any other terms agreed between the parties.
- Appointment of the employee's beneficiaries (in the case of the employee's death).

Although the FLL does not require individual employment agreements to be in Spanish, if an employment agreement needs to be submitted as evidence before the labour authorities it must be translated into Spanish if it has been drafted in another

language. Further, in litigation, the employer will bear the burden of proving that the employee speaks the corresponding language where an employment agreement was drafted in a language other than Spanish, and consequently understood its content at the time of its execution.

Implied Terms

Where the parties did not enter into an individual employment agreement, or the agreement provides for employment conditions that are inferior to the statutory minimums provided by the FLL, the minimum statutory conditions provided by the FLL will automatically apply (unless there is evidence to prove that the employee is in fact entitled to superior employment conditions than those provided by the FLL, in which case, those superior employment conditions will apply).

Collective Agreements

Historically, for a CBA to be binding, it had to be executed between a representative of the employer and the union, filed before the labour court and admitted by that authority. Notwithstanding the foregoing, based on an amendment to the FLL approved in May 2019, a new procedure with regards to the execution of CBAs was introduced, as follows:

- The relevant union must obtain a representativeness certificate (which demonstrates that it represents the employees of a company/workplace) following the process set out in the FLL, which includes a voting process among the corresponding employees which must be validated by the newly created Federal Conciliation and Labour Registration Centre (Registration Centre).
- The union must negotiate with the employer the terms of the CBA.
- After notifying the Registration Centre and subject to validation by that authority, the union must carry out a consultation procedure following the process set out in the FLL under which the majority of the unionised employees to be bound by the CBA must approve its content through a personal, free and confidential voting process.
- If the CBA is approved through the consultation procedure, it must then be executed in writing between a representative of the employer and the union and filed before the Registration Centre, alongside the documentation required by the FLL, including the representativeness certificate.
- The relevant authority must approve the CBA.

Even though the FLL provided that this new procedure should have been in place no later than 2 May 2021, this deadline was not met nationwide, and the implementation of the new regulations regarding the execution of CBAs is being made at different stages. At the time of writing, the new procedures in connection with the execution of CBAs have been implemented in only in eight states, while the rest of the country is still following the previous process.

5. What are the main points to consider if an employer wants to unilaterally change the terms and conditions of employment?

Under the FLL, employees have the right to claim "wrongful" termination of their employment relationship where their terms and conditions of employment are reduced, or unilaterally modified by the employer to the extent that the modification has a detrimental effect on the employee.

However, there are some collective procedures that the employer may be able to follow to reduce benefits. Where an employer can show a genuine and reasonable

need to reduce benefits, certain special terms and rules may apply that allow for that reduction (although the labour court has the sole discretion to decide whether a reduction in benefits can be applied, and if so, which reductions can be applied).

Minimum Wage and Bonuses

6. Is there a national (or regional) minimum wage? Is it common to reward employees through contractual or discretionary bonuses?

Minimum Wage

Mexico has a minimum wage standard. There is a general minimum wage that applies to all employees, regardless of their age, industry and experience. Additionally, there are "professional" minimum wages that apply to certain employees depending on their profession, craft or activity. Professional minimum wages apply to all employees within the specified job regardless of their age, industry and experience.

There are two classifications in the general minimum wage and the "professional" minimum wage groups:

- One which is applicable exclusively to the 43 municipalities that integrate the "Free Zone of the Northern Frontier".
- One of which applies in the rest of the country.

Minimum wages are determined and increased periodically by a National Commission comprising representatives of employees, employers and the government. The general minimum wages for 2021 are:

- MXN213.39 per working day (an average of MXN5,121.36 per four-weekly period) for the 43 municipalities that integrate the "Free Zone of the Northern Frontier".
- MXN141.70 per working day (an average of MXN3,400.80 per four-weekly period) for the rest of the country.

Professional minimum wages are equal to, or higher than, the general minimum wage, and different rates apply depending on the profession, craft or activity.

The FLL does not provide for any salary cap. However, tax legislation provides for specific caps in connection with deductions over salaries and employment benefits. The Social Security Law (SSL) also provides a salary cap for the payment of social security contributions.

Bonuses

In practice it is common to reward employees through contractual/discretionary performance bonuses. However, this is not required by law (the FLL only mandates the payment of statutory benefits).

Working Time, Holidays and Flexible Working

7. Are there restrictions on working hours, and if so, can an employee opt out? Is there a minimum paid holiday entitlement? Is there a statutory right for employees to request to work flexibly?

Working Hours

Restrictions on Working Hours. The FLL provides for maximum working hours

depending on the time of day/night during which the activities are performed. Furthermore, the FLL provides that employees must be given a rest period of at least one day of rest for every six days of work. The FLL classifies work shifts as follows:

- Daytime: between 6.00am and 8.00pm.
- Night-time: between 8.00pm and 6.00am.
- Combined: encompassing periods of both daytime and night-time work shifts, provided that the period corresponding to the night-time work shift is no longer than three and a half hours (otherwise, it will be considered as a night-time work shift).

The maximum daily duration of each work shift is as follows:

- Eight hours for a daytime work shift (48 hours per week).
- Seven hours for a night-time work shift (42 hours per week).
- Seven and a half hours for a combined work shift (45 hours per week).

Overtime Pay. The FLL contains specific provisions relating to overtime. Particular provisions also apply to the work shifts of special jobs as determined by the FLL (for example, crews of boats and aircrafts, drivers, domestic employees, doctors during their residency period and so on). All employees who work overtime are entitled to overtime pay regardless of their position, salary level or any other factor. Employees cannot opt out of receiving overtime pay. To the extent that overtime pay is applicable, it must be paid at a rate of:

- Twice the ordinary hourly rate, in cases where the overtime does not exceed nine hours in a single week.
- Three times the ordinary hourly rate, in cases where the overtime exceeds nine hours in a single week.

Special Restrictions Applicable to Shift Workers. Despite the above, the maximum duration of each work shift per day can be increased by the parties to allow employees to enjoy a rest period on Saturday evenings, provided that the maximum working hours permitted per week is not exceeded.

Rest Breaks

Rest Breaks During the Working Day. Employees who provide their services without disruption during a work shift are entitled to a rest break of at least 30 minutes, which is considered to form part of their work shift. Where employees are provided with a longer rest break by the employer during which they can leave the workplace, no fraction of this longer rest break will be considered as part of their work shift (and employers are not obligated to grant employees any additional rest break).

Rest Periods Between Working Days. The FLL provides that employees must be given a rest period of at least one day for every six days of work, which should take place on Sundays to the extent that is possible. Furthermore, the parties are allowed to increase the duration of the daily working schedule during the week to allow employees to enjoy a rest period on Saturday evenings, provided that the maximum working hours permitted per week is not exceeded. The FLL does not impose any additional rest periods between working days.

Special Provisions for Night/Shift Work. The FLL prohibits minors and pregnant women from working a night-time work shift.

Holiday Entitlement

Minimum Paid Holiday Entitlement. The FLL provides for a minimum vacation

period that all employers must grant to their employees. Minimum vacation days are dependent on the employee's length of service as described below:

- Six days' vacation after one year of service.
- Eight days' vacation after two years of service.
- Ten days' vacation after three years of service.
- 12 days' vacation after four years of service.
- After the fourth year of service, an employee's vacation entitlement will increase by two days for every further four years of service.

Employers must pay full salary and benefits during the employee's vacation period. In addition to the paid holiday entitlement outlined above, employees are also entitled to a vacation premium consisting of 25% of their base salary, payable during the vacation period.

Public Holidays. The FLL provides for seven mandatory days of rest each year. Additionally, every six years there is an additional mandatory rest day when a new president of the country takes office. Electoral legislation may also provide for additional mandatory rest days as required.

Mandatory rest days are not included in the minimum paid holiday entitlement. The employer must pay full salary and benefits for mandatory rest days. There is no entitlement to statutory unpaid holiday.

Flexible Working

The FLL does not provide any statutory right for employees to request to work flexibly. Further, Mexican legislation does not regulate flexible working schedules, and so the implementation of any such schedule must be carefully analysed and documented to mitigate any potential employment liabilities.

Illness and Injury of Employees

8. What rights do employees have to time off in the case of illness or injury? Are they entitled to sick pay during this time off? Who pays the sick pay and, if the employer, can it recover any of the cost from the government?

Entitlement to Paid Time Off

Employees are entitled to paid time off in the case of illness or injury, whether or not such illness/injury has been caused by work. The illness or injury must be certified by the medical authorities of the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*) (IMSS) for the paid time off to apply. The maximum time limit regarding the amount of paid time off that an employee can take is 52 weeks (whether the illness or injury is work related or not). If the illness or injury continues after this period, the IMSS will grant one of the following to the employee:

- Total or partial permanent disability (depending on the gravity of the illness/injury), where the illness or injury is work related.
- Disability for non-occupational illness/injury status, where the illness or injury is not work related.

The effect of either of these grants is that the affected employee will receive a life-long pension from the IMSS. The amount of that pension is calculated based on the employee's salary and varies depending on the specific entitlement. Employers are

only obligated to pay the retirement fragment of the social security contributions during the 52-week period of illness or injury, and all other elements of such contributions are suspended. After the 52-week period concludes, the employer contributions cease provided that the employment relationship is terminated.

Entitlement to Unpaid Time Off

There are no provisions in the FLL or the SSL concerning entitlements to unpaid time off due to illness and injury. Despite this, these regulations provide for unpaid leaves of absence when the employee:

- Has a contagious illness.
- Has a temporary disability caused by an accident or illness which is not work related.
- Is in preventive custody and is subsequently acquitted.
- Is arrested.
- Is complying with mandatory public services and duties under the Constitution.
- Is assigned as representative before the labour courts and/or governmental labour bodies.
- Lacks the documents required by applicable legislation to render their services (where these are the responsibility of the employee).
- Is hired for a seasonal term, and the season has ended.

Recovery of Sick Pay from the State

The state (through the IMSS) is responsible for paying for employees' medical services in the case of illness or injury (whether these have been caused as a result of work or not) whenever an employee has been provided with the corresponding medical certificate by the IMSS' medical personnel. The SSL allows employers, under certain circumstances, to recover sick pay if they execute an agreement with the IMSS under which the employer directly provides medical services and paid time off to employees.

Provisions Concerning COVID-19

Since March 2020, the Mexican Federal Government has issued numerous legislative decrees relating to COVID-19 which introduced social distancing measures, including:

- The temporary suspension of non-essential activities during specific periods of time.
- The partial or total restriction of activities requiring presenteeism in workplaces throughout the country.

In May 2020, the Mexican Federal Government issued technical guidelines specifically aimed at reinstating economic activities, regulating the gradual resumption of activities by implementing health and safety measures within the workplace in order to avoid the spread of the infection and protect employees' health. Additionally, a traffic-light based Epidemiological Alert System was introduced, which has monitored risk levels (coding them to green, yellow or red according to the level of risk) and allowed for the suspension of certain activities from time to time in different ways across every state in Mexico and Mexico City, depending on whether the risk level is green, yellow or red. As part of the COVID-19 regulations, employers were ordered to favour remote working until such time as the epidemiological risk level reached a minimum point (green).

On January 2021, the FLL was also amended to regulate remote working. These

regulations apply to employment relationships under which employees render their personal subordinated services:

- Outside of the employer's premises, in a place of the employee's choosing, for at least 40% of their working time.

- Primarily using information and communication technologies to maintain contact and supervision between the employee and the employer.

Some of the key obligations on employers concerning remote working include:

- Amending the individual employment agreement to insert specific provisions relating to remote working.
- Inserting remote working provisions in either the collective bargaining agreement or the workplace regulations.
- Providing, installing and maintaining the equipment required by employees to perform their services remotely (such as computer equipment, ergonomic chairs, printers and so on).
- Covering the costs incurred by remote workers in connection with telecommunication services and the corresponding proportion of electricity expenses.
- Respecting the right of remote workers to disconnect at the end of the working schedule.
- Obtaining employees' consent before initiating a change from the usual way of working to remote working, unless such change is required due to force majeure.
- Respecting the right of remote workers to revert back to rendering their services in person (rather than by remote working), if they so choose.
- Following the special health and safety regulations applicable to remote workers.

Employees who have COVID-19 symptoms must notify their employer and self-isolate. Further, employers must notify employees who have been in direct contact with a person who is suspected to have, or is confirmed to have, COVID-19 and, depending on the circumstances, those notified employees may also be required to self-isolate.

Employees who become ill with COVID-19 are entitled to a paid leave of absence (on the understanding that their illness must be certified by the IMSS for the paid time off to apply). The IMSS has put in place digital systems that allow employees to obtain this certification remotely to prevent the risk of further contagion. While there is no legal obligation to pay salaries when employees are self-isolating as a preventative measure but have not obtained a certification from the IMSS, the authorities encourage employers to continue to pay salaries in these cases.

No special regulations have been implemented concerning the termination of employment as a result of the pandemic, and so the standard rules regarding termination of employment continue to apply.

Rights Created by Continuous Employment

9. Does a period of continuous employment create any statutory rights for employees? If an employee is transferred to a new entity, does that employee retain their period of continuous employment? If so, on

what type of transfer?

Statutory Rights Created

The duration of employees' paid vacation period depends on their length of service, along with any applicable vacation premium (*see Question 7, Holiday Entitlement*). Two of the statutory severance provisions determined by the FLL are calculated based on employees' seniority. The FLL also grants extraordinary protection against dismissal to employees with 20 years of service or longer. Additionally, where all other circumstances are equal, employees with a longer length of service are to be preferred over their peers when considering promotions, reductions to the workforce, work suspensions and so on.

Consequences of a Transfer of Employee

The consequences of a transfer of employee will vary depending on the way in which the employees are transferred. For example, where the previous employer has effectively been substituted for the new employer by means of an employer substitution (that is, a company transfers its rights and obligations relating to the employment relationships of the transferred employees to the new employer), the employees' original terms and conditions of employment (including seniority) must be maintained. However, where the original employer terminates the original employment relationships and the new employer rehires the employees, the terms and conditions of employment can be varied. The same general protections from dismissal in any employment relationship apply in the case of employees dismissed as a direct result of a transfer (that is, a transfer is not considered "just" cause for terminating an employment relationship and consequently such dismissal gives rise to the same rights as those for "wrongful" dismissal).

Fixed-Term, Part-Time and Agency Workers

10. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees? To what extent are part-time workers entitled to the same rights and benefits as full-time workers?

Temporary Workers

Temporary workers are entitled to the same rights and benefits as permanent employees, except for the provisions on severance payments (statutory severance payments for temporary employees vary depending on the duration of their employment relationship).

Agency Workers

An amendment to the FLL which was passed in April 2021 has generally prohibited the outsourcing/subcontracting of personnel (that is, where an employer provides the services of its own employees to another person/entity). The outsourcing of personnel can now only take place where subcontracted employees provide specialised services (which is defined as services that are not part of the corporate purpose or economic activity of the person/entity for whom the services are being provided). Under this amendment, subcontracted employees are not entitled to the same rights and benefits as the employees of the person/entity for whom the subcontracted services are being provided.

Part-time Workers

Part-time workers are entitled to the same rights and benefits as full-time employees,

on the understanding that it is feasible to provide part-time workers with a salary in proportion to the hours that they work.

Discrimination and arassment

11. What protection do employees have from discrimination or harassment, and on what grounds?

Protection from Discrimination

The Constitution and the FLL prohibit any type of discrimination against employees. Employment legislation only provides that certain sanctions can be imposed on employers who discriminate against their employees; however, it does not provide for any compensation for employees who have been discriminated against. The remedies for employees who are victims of discrimination is to:

- Seek the payment of damages before the civil courts based on the specific facts of their own case.
- File a complaint before the National Council to Prevent Discrimination (*Consejo Nacional para Prevenir La Discriminación*) (CONAPRED), created specifically to redress discrimination matters with no pecuniary sanctions.

Protection from Harassment

The FLL prohibits any type of harassment against all employees regardless of their seniority. Employment legislation only provides that certain sanctions can be imposed on employers or employees who have been found guilty of harassing an employee; however, it does not provide for any compensation for employees who have been subjected to harassment. The remedy for individuals who are victims of harassment is to seek damages before the civil courts based on the specific facts of their own case.

Termination of Employment

12. What rights do employees have when their employment or employment contract is terminated?

Notice Periods

There is no obligation under the law for either employers or employees to notify the other party in advance of a dismissal or resignation. Notice obligations for employees are not recognisable or enforceable under local law. Only notice obligations for employers can be enforced if they have been agreed to; however, it is not common for employers in Mexico to agree to notify employees in advance of their employment termination.

Severance Payments

Employees hired for an indefinite term who are dismissed without just cause (as defined in the FLL) are entitled to claim reinstatement or the payment of mandatory severance comprised of all the amounts described below (note that "daily total compensation" is equal to the employee's daily base salary, plus the daily proportion of any employment benefits ordinarily paid to the employee):

- 90 days of daily total compensation.
- 20 days of daily total compensation for each year of service that the employee

has worked.

- 12 days of daily base salary for each year of service that the employee has worked (for the purposes of calculating this, employees' salary is capped at twice the amount of the daily minimum wage).

- Any accrued salaries and benefits (including paid vacation, vacation premium, Christmas bonus and any other accrued benefit).

Employees hired for a definite term who are dismissed without just cause are also entitled to a severance payment, but this is calculated differently from that applicable to indefinite term employees (in most cases, the applicable severance payment will be higher than that applied to indefinite term employees, but this ultimately depends on the duration of the definite term contract).

Where an employee is dismissed for just cause under the FLL, that individual will only be entitled to the payment of accrued salary and benefits (and will not be entitled to any of the other statutory severance payments outlined above). Some examples of actions that amount to just cause for dismissal include:

- That the employee, during the course of the performance of their services, carries out dishonest acts, or acts violently, towards the employer, the employer's family, or the company's personnel, clients or service providers.
- That the employee performs immoral acts, harassment or sexual harassment against any person within the workplace.
- That the employee disobeys the employer (or the employer's representatives), without a justifiable cause, with respect to the work for which the employee is hired.

Procedural Requirements for Dismissal

Where the parties reach an agreement to terminate the employment relationship through mutual consent, there is no requirement to file a notice of the termination with the Labour Board (although the parties can opt to execute an employment termination and release agreement and ratify it before the Labour Board).

Where the employer terminates the employment relationship with just cause (as defined under the FLL), the employer must notify the employee of the termination and reasons for it (either directly to the employee or through the Labour Board by means of an employment termination notice). The Labour Board does not analyse the termination when the termination notice is filed, it only notifies the employee of the termination. If the employer does not notify the termination with just cause (either directly to the employee or to the Labour Board), the termination will be automatically considered to be unjustified.

13. What protection do employees have against dismissal? Are there any specific categories of protected employees?

Protection Against Dismissal

Grounds for Dismissal. Mexican employment legislation is subject to the "job security" principle. As a result, all employees are granted protection from dismissal so that an employer can only terminate the employment relationship with an employee for just cause where the employee commits any of the specific wrongdoings as provided for in the FLL (*see also Question 2* regarding trust employees' protection against dismissal). The parties cannot agree to additional

causes for termination of employment outside of those specifically provided for in the FLL.

Procedural Requirements for Dismissal. Where an employer terminates an employment relationship for just cause, there is a specific procedure that must be followed (*see Question 12, Procedural Requirements for Dismissal*). Failure on the employer's part to comply with this procedure will automatically render the dismissal unjustified. Furthermore, where the affected employee challenges the dismissal, the employer will have the burden of proving, at the labour court's discretion, that the employee is in fact responsible for committing the specific wrongdoing that the employer claims provides just cause for the dismissal. Where the employer fails to prove the employee's wrongdoing, and the dismissal is considered unjustified, the employee must be paid the applicable statutory severance payment (*see Question 12, Severance Payments*).

Prerequisites to Qualify for Protection Against Dismissal. In principle, there are no prerequisites for employees to qualify for protection against dismissal. The only situation where a different criterion will apply concerns employees hired in an employment relationship that is either:

- For an initial training period.
- Subject to a probation period.

In both of these cases, if the employee in training/subject to probation did not demonstrate that they have (or have acquired) the appropriate knowledge or skills required to perform the tasks for which that employee was hired, then a simpler process for the termination of employment will apply, provided the termination of employment occurs during the training/probation period.

Protected Employees

All employees are entitled to protection against dismissal (except for just cause), regardless of their seniority (although *see Question 2* for the particulars regarding trust employees' protection against dismissal).

Resolution of Disputes Between an Employee and Employer

14. Is there a governmental or independent organisation to which employees can refer complaints in the event that there is a dispute between the employee and the employer?

The competent authorities to resolve all employment disputes in Mexico arising from employment relationships between private parties are the Conciliation and Arbitration Labour Boards, bodies which derive from the executive branch of the government. Labour claims can be filed before the federal or local Conciliation and Arbitration Labour Boards, depending on the jurisdiction.

Despite the above, on 2 May 2019 an amendment to the FLL came into force that provides, among other matters, for the following:

- The creation of new local and federal labour courts which will derive from the judicial branch of the government, and will replace Conciliation and Arbitration Labour Boards in the resolution of labour conflicts. Local labour courts will begin operating no later than 2 May 2022, while federal labour courts will begin operating no later than 2 May 2023.
- The creation of the Registration Centre, an authority that will oversee:

- The creation of the Registration Centre, an authority that will oversee:

    - the registration of all CBAs, internal workplace regulations and unions; and
    - the new mandatory pre-trial conciliatory procedure at a federal level.

    Even though the FLL provided that the Registration Centre should have commenced its registration activities no later than 2 May 2021, this deadline was not met nationwide, and the commencement of this authority's registration activities is now being implemented at different stages (at the time of writing, the Registration Centre has started to operate in only eight states across the country). However, the FLL provides that the Registration Centre should begin its conciliatory activities no later than 1 May 2023.

- The creation of local conciliation centres, which will oversee the new mandatory pre-trial conciliatory procedure on a local level. Local conciliation centres should begin operating no later than 1 May 2022.

Additionally, the constitution provides a specialised forum (Federal Court of Conciliation and Arbitration) to resolve employment disputes in Mexico arising from employment relationships between the government and its employees. Resolution of employment disputes before any of the labour authorities described above is free of charge. However, each party must bear its own legal fees in connection with any claim or procedure (the government can assign free representation for employees if they so request).

Redundancy/Layoff

15. How are redundancies/layoffs defined, and what rules apply on redundancies/layoffs? Are there special rules relating to collective redundancies?

Definition of Redundancy/Layoff

Individual redundancies are not regulated by the FLL. Therefore, individual redundancies are not considered as a just cause for terminating an employment relationship and consequently such a dismissal gives rise to the same rights as those that arise for wrongful termination (*see Question 12, Severance Payments*). Collective redundancies (or collective termination of employment relationships) are only allowed in the specific cases set out in the FLL (*see below, Collective Redundancies*).

Procedural Requirements

Individual redundancies are not regulated by the FLL and are consequently considered to constitute wrongful termination of the employment relationship under Mexican legislation. Individual layoffs (that is, the individual suspension of an employment relationship) are only permitted in the specific cases provided by the FLL. Collective layoffs (the collective suspension of employment relationships) are permitted only in the specific circumstances set out in the FLL, and the employer must seek authorisation from the labour court to implement the collective suspension of employment relationships. Such circumstances can include (among other things):

- Acts of God.
- Employer's disability or death (where the employer is an individual) that results in the suspension of work.
- Lack of raw materials beyond the employer's control

- Lack of raw materials beyond the employer's control.
- Excess in production.
- Temporary non-profitability of the business.
- Lack of economic funds for the normal execution of the work that is beyond the employer's control.
- Suspension of work declared by the sanitation authorities due to sanitary emergencies.

Layoffs (whether individual or collective) that effectively amount to dismissal are considered to constitute wrongful termination of the employment relationship under the FLL.

Redundancy/Layoff Pay

Where individual redundancies are made, employers must make a payment of full statutory severance pay. Where layoffs are made, employers must pay:

- Full salaries and benefits to employees in the case of individual layoffs during the period of suspension.
- Severance pay as determined by the labour court (not exceeding the amount of one month's salary) for collective layoffs (employers are released from the obligation to pay salary and benefits during the period of suspension).

If layoffs are made that effectively constitute a dismissal (whether individual or collective), employers must pay full statutory severance pay (*see Question 12, Severance Payments*), unless the dismissals amount to a collective redundancy (*see below, Collective Redundancies*).

Collective Redundancies

Collective redundancies are only permitted in the specific circumstances set out in the FLL. Such circumstances can include (among other things):

- Acts of God.
- Employer's disability or death (where the employer is an individual) that results in the termination of work.
- Non-profitability of the business.
- Depletion of the product (in the extraction industries).
- Bankruptcy where the relevant authority determines the closure of the business.

The employer must obtain the authorisation of the labour court to implement collective redundancies. If they are approved by the labour court, the employer must pay the employees affected partial statutory severance pay (employers are released from the obligation to pay the severance for 20 days of daily total compensation per each year of service: *see Question 12, Severance Payments*).

Employee Representation and Consultation

16. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? What does consultation require? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

Management Representation

Employees are not entitled to management representation.

Consultation

Employee consultation is required in connection with the following matters:

- Productivity, training and instruction (for companies with 50 or more employees).
- Health and safety.
- Preparation of internal workplace's regulations.
- Distribution of profit sharing.
- Preparation of employees' seniority chart.

Under the FLL, employers must incorporate joint commissions with the employees on all the matters listed above for both parties to agree on the actions that should be taken.

Major Transactions

The FLL does not provide any obligation to consult employees in connection with major transactions. However, for transactions that require a transfer of employees, it may be necessary to informally approach the union (where there is one in place) to mitigate the risk that the union implements strike action if it disagrees with the terms of the transfer.

17. What remedies are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Remedies

The labour authorities (whether as a result of their monitoring activities or through employees' complaints) can sanction employers who fail to integrate the joint commissions described in *Question 16* or who incorrectly create or operate them. These sanctions can include:

- Economic penalties.
- Imposition of a duty to appropriately incorporate the corresponding joint commissions.
- Reversing the actions taken by such joint commissions.

Employee Action

Where the employer fails to set up the joint commissions, or where the employees disagree with the integration, decisions or actions of such commissions, employees can file a claim before the labour authorities.

Consequences of a Business Transfer

18. Is there any statutory and/or common law protection of employees on a business transfer?

Automatic Transfer of Employees

When a company transfers its entire business, including assets (that is, it undergoes a

stock transfer), employees are automatically transferred to the acquiring entity, which becomes a substitute employer. In principle, there are no notification obligations triggered in stock transactions. There is no automatic transfer of employees on a simple transaction of assets.

Protection Against Dismissal

On a stock transfer, employees maintain the same protection against dismissal as they had before the transfer.

Harmonisation of Employment Terms

Since the FLL prohibits any reduction in employment conditions, if any reduction is required to achieve the harmonisation of employment terms, the employer must terminate the current employment relationships of the affected employees (with or without full severance pay, depending on the agreement with such individuals) and initiate new employment relationships with different terms. Employees' consent is required to both terminate the existing employment relationships and initiate new ones.

Employer and Parent Company Liability

19. Are there any circumstances in which:

- **An employer can be liable for the acts of its employees?**
- **A parent company can be liable for the acts of a subsidiary company's employees?**

Employer Liability

Employment legislation does not generally regulate employer liability for the acts of employees, and such liability depends on each area of law and the individual regulations of that law. However, employers can be liable for the acts of their employees, especially if the employee was representing the employer when they committed the act or was following the employer's instructions.

Parent Company Liability

Employment legislation does not generally regulate parent company liability for the acts of employees of its subsidiaries, and liability will depend on each area of law and the individual regulations of that law.

Employer Insolvency

20. What rights do employees have on the insolvency of their employer? Is there a state fund which guarantees repayment of certain employment debts?

Employee Rights on Insolvency

Monies owed to employees have superiority and take precedence over all other claims in the case of employer insolvency.

State Guarantee Fund

There is no state fund which guarantees the repayment of any employment debts in the case of an employer's insolvency.

Health and Safety Obligations

21. What are an employer's obligations regarding the health and safety of its employees?

Employers have the following health and safety obligations:

- Ensure optimal health and safety conditions to avoid work-related accidents and diseases.
- Set up a health and safety joint commission to investigate causes of work-related accidents and diseases and propose/implement preventative measures, as well put a stop to activities when they may pose imminent health and safety hazards.
- Observe the Official Mexican Standards in connection with health and safety.
- Obtain the corresponding permits and authorisations on health and safety matters.

Taxation of Employment Income

22. What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

Foreign Nationals

Individuals who have established their residence in Mexico will be regarded as Mexican residents (regardless of the number of days they spend in Mexico). Where individuals also have other addresses in other countries, a tiebreak rule regarding the factual centre of vital interest of those individuals will be applied to determine their residency. For international employees who both reside in Mexico and who maintain an address in their home country, further analysis must be made with respect to any tax treaty provisions, and the tiebreak rules may lead to a different outcome than those applicable under the domestic tax rules to define that individual's tax residency.

Nationals Working Abroad

Mexican residents must pay income tax on all the income they earn on a worldwide basis. Therefore, compensation earned from both Mexican employers and foreign sources is subject to tax in Mexico. Only where a Mexican national is no longer resident in Mexico will income tax not be payable in Mexico.

23. What is the rate of taxation on employment income? Are any social security contributions or similar taxes levied on employers and/or employees?

Rate of Taxation on Employment Income

Employment income is taxed at progressive rates from 1.92% up to a maximum of 35%, depending on the employee's income.

Social Security Contributions

Social security contributions must be paid by:

- Employees through withholding, which is achieved by the employer applying an overall rate of 2.38% over the adjusted daily wage.
- The employer, who must pay up to 9.66% of the employee's salary.

The employment income regarded as the basis for calculating these contributions is subject to a cap that is determined based on a multiple of the minimum daily wage.

Intellectual Property (IP)

24. If employees create IP rights in the course of their employment, who owns the rights?

In principle, the employer owns the IP rights created by employees in the course of their employment, during their working schedules and/or using employer's tools/facilities/information. However, it is advisable to agree in writing the extent of the employer's IP rights over any creative works of the employee created in these circumstances.

Restraint of Trade

25. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Restriction of Activities

Restriction of Activities During Employment. It is possible to restrict an employee's activities during employment provided that the restricted activities would interfere with the employee's work/working schedule.

Restriction of Activities After Termination of Employment. The Constitution provides for "freedom of work", and so employment-related restrictive covenants are usually non-enforceable. It is also not advisable to enter into any civil employment-related restrictive covenants during the term of an employment relationship, as any compensation paid to the employee may be considered as part of their salary in the case of any legal dispute.

Post-Employment Restrictive Covenants

Employment-related restrictive covenants are usually non-enforceable. However, the parties can enter into a civil employment-related restrictive covenant under which the former employer pays the former employee certain sums of money in consideration for the former employee refraining from doing any of the restricted activities. The only sanction that can be applied if the former employee then carries out any of the restricted activities is the seizure of payments agreed between the parties and, in limited cases and subject to the particularities of the case, the payment of damages before the civil authorities.

Relocation of Employees

26. Can employers include mobility clauses in employment contracts, or take any other measures, to ensure that employees are obliged to

relocate?

Employers can include mobility clauses in individual employment agreements providing that employees are obligated to relocate as required by the employer. However, the scope of these types of clauses is limited, although neither the FLL nor the decisions issued by the labour courts specify the extent of such limitation. It is up to the labour courts to determine, at their entire discretion, whether a change to the workplace of an employee is reasonable or so excessive that it implies a change in the employment conditions which will entitle the employee to the payment of severance. In practice, employers tend to limit the exercise of mobility clauses to relocation within the same city so that employees do not need to change their home address.

Where the relocation has been specifically agreed since the engagement of the employee and the employee agrees to relocate, the limitations described above will not apply. However, employers will still acquire a heavy burden of additional obligations (repatriation expenses, housing expenses, medical services, social security benefits, provision of information about competent authorities, approval of the agreement by the labour court, in some cases payment of a deposit to guarantee compliance with these obligations, visa/work permits, and so on), particularly when the employee is to relocate abroad.

Proposals for Reform

27. Are there any major proposals to reform employment law in your jurisdiction?

There are currently no substantial proposals to reform employment law in Mexico.

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Areas of practice. Labour and employment; pensions, benefits and social security.

Recent transactions

- Assistance with employment matters during the closing of Wells Fargo's representation office in Mexico, including the negotiation, modification and termination of stock option plans granted to executive employees.
- Represented WeWork in the formalisation of its labour structure, including the execution of over 30 collective bargaining agreements.

- Advises IBM; Continental AG; Willis Towers Watson; Alcon/Novartis; GE Appliances; Toshiba; Live Nation; Blackstone; Citibank; ACCO Brands; General Atlantic; CBRE Group, Inc; NFL (National Football League); NBA (National Basketball Association); International Flavors & Fragrances Inc; Jones Lang LaSalle; Marriott; Goldman Sachs; Wells Fargo;

  WeWork; and El Palacio de Hierro (among others) on employment matters.
- Advises many international companies on the alternatives to implement their worldwide compensation structures in Mexico (stock option plans, phantom equity awards, restricted stock unit plans and so on).
- Assists many companies in redundancies for directors and executives.

Languages. Spanish, English

Professional associations/memberships. Member of the International Bar Association.

Publications

- *Chambers and Partners (Mexico Chapter), "Global Practice Guide for Employment", 2018 and 2019.*
- *Chambers and Partners (Mexico Chapter), "Global Practice Guide for Outsourcing", 2019.*
- *Thomson Reuters, "Employment and Employee Benefits in Mexico: Overview", 2017, 2018 and 2021.*
- *International Bar Association, Employment and Industrial Relations Committee Publication, "Assignment of foreign employees to render services in Mexico".*
- *Financier Worldwide (Mexico Chapter), "Labour & Employment Annual Review", 2016, 2016 and 2017.*
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Areas of practice. Labour/employment; pensions, benefits and social security.

Recent transactions

- Carve-out of Continental's Powertrain business involving the transfer of over 5,000 employees from different legal entities, involving numerous complexities.

- Counsel to L Catterton in the restructure of the employment and compensation schemes in connection with Mexican restaurants portfolio with over 900 employees to mitigate employment, social security and tax liabilities.
- Advice Hanon Systems in the planning and implementation of the transfer of about 500 employees from Magna International, with specific labour and social security challenges.
- Preparation and formalisation of highly complex long-term incentive plan granted by Altán Redes to members of its executive team.
- Broad experience representing clients in all legal aspects of their labour relationships in Mexico, as well as other multijurisdictional labour issues, including legal advice and preparation of employment documents such as labour agreements, hiring and compensation schemes, employment benefits, collective bargaining agreements, modification of employment conditions, transfer of employees, termination of employment relationships, legal audits and so on.

Languages. Spanish, English

Professional associations/memberships. Member of the International Bar Association; British Chamber of Commerce in Mexico; National Association of Business Lawyers (*Asociación Nacional de Abogados de Empresa*).

Publications

- *Chambers and Partners (Mexico Chapter), "Global Practice Guide for Employment", 2018 and 2019.*
- *Chambers and Partners (Mexico Chapter), "Global Practice Guide for Outsourcing", 2019.*
- *Thomson Reuters, "Employment and Employee Benefits in Mexico: Overview", 2017, 2018 and 2021.*
- *International Bar Association, Employment and Industrial Relations Committee Publication, "Assignment of foreign employees to render services in Mexico".*
- *Financier Worldwide (Mexico Chapter), "Labour & Employment Annual Review", 2015 and 2017.*

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