THE EMPLOYMENT LAW REVIEW

Twelfth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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MEXICO

Jorge Mondragón, Luis Enrique Cervantes and Fernando de Buen[1]

I INTRODUCTION

i Legal framework

Employment relationships are governed primarily by the Mexican Constitution, in which the guidelines for employment are established. The Constitution was enacted in 1917 and has been amended several times. In labour matters, the Constitution provides a response to workers' demands for better terms and conditions of employment – given the abuse they were subjected to by employers before the enactment of the Constitution – and thus seeks to balance production and capital forces with regard to the rights and conditions of working people by setting forth minimum statutory benefits and conditions within employment relationships. Article 123 of the Constitution governs everything relating to employment relationships in Mexico and is divided into two main sections: Section A, for private employment relationships (between private employers and their employees), and Section B, for relationships between government entities and their employees.

The Mexican Federal Labour Law (FLL) regulates the labour and employment principles set forth by the Constitution, covering in detail all aspects relating to individual and collective employment relationships within the whole territory of Mexico: from definitions of basic concepts of labour and employment, types of contracts, statutory benefits and compensation, health and safety, training and instruction regulations, and profit-sharing obligations, to procedural and judicial matters, such as labour claims, strikes and all types of labour and employment proceedings (judicial and administrative).

Since its inception, labour legislation has undergone two major amendments and some minor reforms. As a result of amendments to the FLL, the trends in labour and employment law have resulted in new methods of handling and managing employment and industrial relationships between employers, employees and labour authorities. These amendments are the most substantial changes that have been made to the statute since it was integrally amended in 1970, and they came more than a year after a fundamental reform was made to the Constitution with regard to the protection of human rights.

Both the Constitution and the FLL divide labour matters into two jurisdictions – federal and local – depending on the industry and activities in which the employer participates. The federal government, through its conflict resolution bodies (federal conciliation and

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arbitration boards) and through its administrative labour authority (the Ministry of Labour and Social Welfare), is in charge of resolving controversies relating to the following industry sectors or activities:

a textiles;
b electricals;
c film industry;
d rubber;
e sugar;
f mining;
g metallurgical and iron and steel, covering the exploitation of basic minerals, the benefit and smelting of these, and extraction of metallic iron and steel, in all their forms, and lamination;
h hydrocarbons;
i petrochemicals;
j cement industry;
k lime industry;
l automotive, including mechanical or electrical parts;
m chemical, including pharmaceutical and medicines;
n cellulose and paper;
o oil and vegetable fats;
p food-producing industry, covering exclusively the manufacture of packed, canned or bottled food;
q manufacture of canned or bottled beverages;
r rail industry;
s basic lumber industry, covering manufacturing in sawmills or of plywood;
t glass industry, exclusively the manufacture of flat, plain and cut glass, glass containers;
u tobacco industry, covering the benefits of the manufacture of tobacco products; and
v banking.

Application of the law with regard to any industry branch or activity not listed above shall be the responsibility of local (state) governments and administrations through their own labour and employment judicial and administrative bodies. Nonetheless, these bodies must also abide by the FLL in matters involving labour and employment.

In addition, the Social Security Law governs the mandatory social security, nursery, medical and retirement benefits granted by the social security system to all employees. Employers are obliged to register themselves and their personnel with the Mexican Social Security Institute, and both parties are obliged to make the applicable social security contributions for employees' protection (employees' contributions are withheld from salaries and paid by employers on their behalf to the Mexican Social Security Institute). The Law also outlines the rights and access of employees and employers to social security benefits, which encompass the following insurance or cover in favour of employees: occupational risk, health and maternity, disability and life, retirement pensions and day care.

The Law for the National Fund for the Housing of Employees, the Law of the Institute of the National Fund for Workers' Expenditures and the Law for the Retirement Savings System are other pieces of social security legislation governing different and more specific aspects of additional social security and welfare benefits in Mexico, such as loans granted to employees for buying consumer goods and services, and loans for the acquisition, remodelling or extension of real estate property.

ii Judicial and administrative authorities

The authorities in charge of solving any employment-related conflicts are the labour boards; however, in accordance with the amendments made to the FLL on 1 May 2019, which were published in the *Official Gazette of the Federation*, the labour boards will cease to exist and will be replaced by labour courts, which will be dependent on the judicial system.[2] Moreover, according to the fifth and sixth transitory articles of the reforms to the FLL, local and federal labour courts shall start operations within three years and four years, respectively, following the entry into force of the decree.

Currently, there are both federal and local labour boards, depending on the industry sector, covering the activities of the companies involved in trials. These boards are tripartite, being composed of one representative of the employer, one representative of the employees and one representative of the government, to ensure there is balance in every employment relationship, as mentioned in Section I.i, and they depend directly on the local or federal government, respectively. Any constitutional remedy proceeding (*amparo*) filed by the parties on trial against any resolution issued by a local or federal labour board will be resolved by the federal courts or by the Supreme Court of Justice (if the case fulfils the proper requirements), which depend directly on the federal judicial power.

In addition to the labour boards, the Ministry of Labour and Social Welfare, at a federal level, and the local ministries of labour, are the authorities in charge of the enforcement of employment regulations within their respective jurisdictions.

II YEAR IN REVIEW

As mentioned in Section I, throughout its history, labour legislation has undergone major amendments and reforms to adapt to the constant evolutions in employment relationships. Some interesting new interpretations and concepts have recently come to light. The following is a summary of the main topics regarding Mexican labour and employment law.

i Reform to the FLL

One of the major amendments to labour legislation occurred on 1 May 2019, as result of the 2017 amendments to Article 123 of the Constitution. In this regard, one main aspect of the reform is the creation of labour courts to replace the conciliation and arbitration boards, delegating the administration of labour justice to federal and local court systems, thereby making the switch from the executive branch to the judicial branch.

In 2020, the states of Campeche, Chiapas, Durango, Estado de México, San Luis Potosí, Tabasco and Zacatecas started the transition of labour justice to federal level. The states of Aguascalientes, Baja California, Baja California Sur, Colima, Guanajuato, Guerrero, Morelos, Oaxaca, Puebla, Querétaro, Quintana Roo, Tlaxcala, Veracruz and Hidalgo are expected to start the transition in 2021.

2 The labour boards will remain as such until May 2022 with respect to local conciliation and arbitration boards and until May 2023 in relation to federal conciliation and arbitration boards.

ii Amendments to the FLL in relation to outsourcing employment structures

Currently there is one amendment bill proposal relating to the FLL in discussion in Congress, which aims to establish more rigorous conditions for valid outsourcing structures. The reason behind this amendment bill is that all companies comply with all their corresponding employment and social security obligations, including the mandatory payment of employee profit-sharing.

The amendment bill will aim to strengthen the fact that outsourcing employment structures shall only be valid if the contracting party agrees with the contractor on the provision of specialist services, which do not constitute activities pertaining to the contracting party's corporate purposes; otherwise, outsourcing structures might be challenged and may ultimately be considered to be illegal and, therefore, economic penalties and potential criminal actions might be imposed on the parties. In terms of the foregoing, insourcing employment structures might potentially be prohibited if the legal entities incorporated within a business do not justify their specialist corporate purposes pursuant to the services to be provided in favour of the legal entity that holds the business's profits.

In that regard, Congress has invoked an open parliament to perform a more rigorous discussion between the business sector and unions, which is likely to take place within the first months of 2021, especially to reach an agreement with respect to the limits to be applied to the payment of employee profit-sharing.

III SIGNIFICANT CASES

The labour courts remained closed for a long period because of the SARS-CoV-2 (covid-19) pandemic. As a result, no labour and employment significant cases were decided during 2020. However, it should be noted that during the covid-19 health emergency, the Mexican government has introduced several criteria regarding employers' obligations to mitigate the spread of the covid-19 virus within work centres.

During the first months of the covid-19 spread in Mexico, only companies engaged in essential activities were allowed to continue their operations, provided the Mexican Social Security Institute (IMSS) granted the necessary authorisation. A few weeks later, companies engaged in non-essential activities were allowed to continue their operations but with several restrictions (i.e., only 30 per cent of employees were allowed to carry out their duties within work centres and employers had to instal the necessary equipment within their premises so as to ensure that employees could maintain the proper distance between each other).

In terms of the foregoing, all the restrictions implemented by the Mexican government were subject to a 'pandemic traffic light', specially at a local level (pandemic traffic light per state) and, depending on the risk level reported in each of the states, certain restrictions would apply to each of them.

In Mexico City, additional authorisations were required for employers to continue operations, as well as additional obligations with which they had to comply to mitigate the imposition of economic fines (i.e., for employeers with a minimum of 100 employees, to carry out covid-19 detection tests on 3 per cent of employees who carry out their duties within work centres).

During 2020, the IMSS also issued criteria whereby covid-19 shall be considered an occupational disease (i.e., it needs to be demonstrated that the employee was exposed to someone with the virus during the performance of his or her duties). In the event that an

employee is considered to have suffered an occupational disease becuase of covid-19 virus, the IMSS will be subrogated in the payment of salaries in terms of the labour and social security legislation.

IV BASICS OF ENTERING INTO AN EMPLOYMENT RELATIONSHIP

i Employment relationship

According to the FLL, entering into an employment contract is mandatory, particularly because it allows both parties to set in writing the terms and conditions of the employment relationship. However, the FLL provides that rendering personal and subordinated services in favour of another person or corporate entity without entering into an employment contract has the same effect as if the parties had executed a contract, and that the omission in the execution of an employment contract is the direct responsibility of the employer.

Under the current amended labour statute, there are four types of contracts for hiring personnel. A standard contract is entered into for an indefinite term (which is the general rule), based on the principle of employment stability that prohibits employers from laying off their workforce without sufficient grounds (based on the causes for termination set forth in the FLL).

Contracts for a fixed term or for a specific task may be entered into when the needs of the employer are in accordance with such an engagement. To enter into such an agreement validly, the employer must justify the reason for hiring an employee for a fixed term or for a certain undertaking, and hence the contract will terminate automatically at the end of its term (fixed-term employment) or at the completion of the undertaking (employment for a specific task). If the work or activities for which the employee was originally hired for a fixed term or specific task continue after the end of the contract, then the employment relationship will be automatically extended and consequently deemed to be for an indefinite term.

Article 25 of the FLL provides the statutory content required for every employment contract, namely:

a name, nationality, age, gender, marital status, personal identity number and taxpayer registration number of the employee, and the address of both the employee and the employer;

b whether the employment relationship is seasonal or for a specific task, for a fixed term, for initial training or for an indefinite term, and whether the contract is subject to a trial period;

c the service or services to be provided, which shall be stated in as detailed a manner as possible;

d the place or places where the work shall be carried out;

e the duration of the work shift;

f the form and amount of the salary;

g the day and place of salary payment;

h an indication that the employee will be trained or instructed in terms of the plans and programmes established by the company, pursuant to provisions of the FLL;

i any other term and work condition, such as days of rest, holiday and any additional agreement reached between employee and employer; and

j the designation of beneficiaries for the payment of accrued and uncollected salaries and benefits upon the death of the employee or those generated by his or her death, or disappearance arising from a criminal act.

In addition, although not mandatory, it is advisable to detail any benefit paid to employees as part of a compensation package, a work-for-hire provision or a provision regarding information privacy and personal data protection, as well as confidentiality of the information provided to or generated by employees.

Execution of the employment contract shall be on the starting date; however, if parties are not in a position to enter into the contract on this date, it is possible to do so later, but the contract would have to include the starting date considered for the purposes of seniority.

Employers are not entitled to change the terms of employment unilaterally. If parties wish to amend or change the employment contract or its terms, it would be necessary to execute an amendment to the contract. However, the FLL prohibits employees from waiving any of their acquired rights; thus, a provision stating lower employment conditions or benefits than those they were receiving prior to the amendment will be considered null and void as a matter of law. Therefore, amendments or changes to the employment contract would only be valid if better terms and conditions for employees are foreseen or if benefits above the minimum required by the FLL are first liquidated (paid) with the written consent of the employee through the payment of the corresponding severance.

In all employment relationships, and regardless of whether the employer is a Mexican national or entity or not, minimum statutory benefits set forth in the FLL must be granted and paid to employees, such as paid vacations, a vacation bonus and a Christmas bonus. The law foresees minimum standard benefits that cannot be waived, and employers cannot grant anything below those minimum standards.

Vacations are granted according to employees' seniority: for the first year of service, employees are entitled to a minimum of six days' vacation; for the second year of service, they are entitled to eight days; for the third year, they are entitled to 10 days; and for the fourth year, they are entitled to 12 days. From the fifth year onwards, two days are added every five years. In addition to this, employees are entitled to a minimum of 25 per cent of the salary earned during their holidays as a vacation bonus.

Employees are also entitled to a Christmas bonus equivalent to at least 15 days' salary, which must be paid no later than 20 December each year. The purpose of this bonus is to cover all expenses required for all the year-end festivities.

In respect of taxes, employers are bound to withhold and deliver to the tax authority any and all applicable taxes on salaries and benefits granted to their employees. Also, employers are bound to calculate and pay the corresponding social security contributions.

A new chapter on teleworking and remote working is to be included within the FLL. An amendment bill in this respect sets forth that teleworking and remote working is a subordinate work arrangement in which the paid activities are performed somewhere other than the employer's workplace; therefore, no physical presence is required at the workplace. In these circumstances, information and communication technologies are essential for maintaining contact between the employer and the individual who will be working under this regime. The proposed changes to the FLL also establish that the terms and conditions of employment under the teleworking and remote working regime shall be included within the individual employment agreements in addition to the rest of the terms and conditions applicable to those whose employment relationship is governed by the general provisions of the law.

ii Probationary periods

Two types of probationary periods are provided for in the FLL.

An initial training period allows employers to train their employees for three months (or six months for high-level executives). At the end of the training period, if the employer considers that the employee has not demonstrated sufficient competence to carry out the job for which he or she was hired, the contract shall terminate naturally without any liability for the employer other than paying the corresponding salaries and benefits accrued during the training period. For these purposes, at the end of the training period, the employer must verify that the employee did not demonstrate sufficient competence for a permanent engagement and that it heeded the recommendation of the company's training commission.

The addition of a trial period to temporary contracts (provided they are for a term of at least 180 days) and permanent contracts of employment allows companies to assess their new personnel for 30 days (or up to 180 days for employees in high-level executive, managerial and supervisory positions, and for employees with a bachelor's or technical degree), which cannot be extended. At the end of the trial period, if the company determines that the employee does not meet the necessary requirements and knowledge to perform the job, the contract may be terminated without any liability for the employer, except for the payment of the corresponding salaries and benefits accrued during the trial period. Further, if the employer wishes to terminate the employment relationship without incurring any liability, it must first take into consideration the opinion issued by the company's training commission. In this regard, employers must include objective elements in a contract with which to assess the abilities of the employee.

The FLL specifically provides that employers cannot execute subsequent training or trial period contracts with the same employee; they are valid once only. When the term of the trial or training period has ended, the contract and the employment relationship will continue and be considered as indefinite, as a matter of law, unless the employer deems that the employee does not meet the requirements for the position, in which case the employment relationship may be terminated.

iii Establishing a presence

Foreign companies can hire Mexican employees without being incorporated under Mexican laws but, as with every other employer, they have to comply with all the obligations relating to employment, such as labour, social security and taxes, which makes it necessary for foreign employers to register with the tax and social security authorities and to obtain the corresponding tax identity number. The foregoing implies a practical problem for foreign employers, as to obtain the aforementioned registrations, they need to set up a Mexican branch or incorporate a subsidiary. However, foreign employers who hire Mexican employees from abroad could fall under the permanent establishment concept for fiscal purposes, which means that the activities performed by the hired employee in Mexico could be deemed to be part of a permanent establishment of the foreign employer and, as such, all income or revenue generated by the employee would be subject to corporate tax in Mexico.

However, foreign companies exploring the possibility of doing business in Mexico without having to incorporate, enrol with the social security system as an employer and obtain a tax identity number, can resort to an outsourcing agency or a payroll company through the execution of a services agreement in exchange for an agreed fee or consideration with the corresponding vendor. This has become a common business practice in Mexico

and provides companies with the possibility of transferring employment and social security obligations to a third party, with the obligation of paying the cost of the employment plus the corresponding fee for the services provided by the agency.

Nevertheless, and as outlined above, the FLL now provides certain limitations and requirements for outsourcing engagements, specifically for beneficiaries of the outsourced services not qualifying as employers and, as such, having to fulfil all employer obligations towards the outsourced employees assigned to them. In this regard, it is of paramount importance to structure each outsourcing engagement in terms that comply with the applicable provisions set forth in the FLL as well as to negotiate the outsourcing agreements in such terms that the outsourcing agencies assume the liabilities that were imposed on the beneficiaries under the amendments, since this could be material and, in principle, should be obligations that would have to be borne by the vendors or personnel providers as part of their services and in consideration of the fees paid to them by the clients.

In connection with independent contractors, a foreign company doing business in Mexico without being registered or incorporated under Mexican law can engage an independent contractor by entering into a services agreement with the contractor, in which it is specified that the contractor would act as an independent contractor not subordinated to the foreign entity. As such, the contractor would have to invoice the foreign entity for the services rendered.

V RESTRICTIVE COVENANTS

Article 5 of the Constitution states that no individual shall be kept from engaging in any profession, industry, commerce or job that best suits him or her, as long as it is lawful. Therefore, from a strict labour law perspective, non-compete and non-solicitation clauses and agreements are generally not enforceable in Mexico, as the authorities cannot restrict individuals in exercising the aforementioned right. However, if such clauses and agreements are executed or established to be in force for the duration of an employment relationship, then the non-compete and non-solicitation clause or agreement would be enforceable in Mexico.

Notwithstanding the foregoing, some employers have adopted the practice of executing agreements (of a civil nature) with their employees under which the employees assume covenants (i.e., non-compete, non-solicitation or non-disparagement) tied or linked to a liquidated damages provision that would have to be paid by the employee in the event of a breach of the covenant, in which case the employee is not restrained from performing the restricted activity but, in the event of a breach, could be held liable for the payment of the established amount. The foregoing could be a deterrent, dissuading employees from competing or soliciting against their former employers; however, these clauses could also be held null and void if related directly to the employment, or if submitted to and resolved by a labour board or labour federal court. Another approach is paying the former employee an agreed amount for not competing, which must be paid at the end of the non-compete period, since it is the best way to encourage a former employee not to engage in competitive activities during the agreed period.

Non-compete provisions are governed and interpreted through the judgments issued by Mexican courts and not by the laws. Furthermore, these provisions will be valid as long as they refer to a specific period, a specific geographical zone (within the Mexican territory) and an amount to be paid for compliance with the provisions.

VI WAGES

i Working time

The FLL states that for every six days worked, employees shall be entitled to one day of rest. There are three types of work shifts, namely:

a eight hours a day for daytime work (48 hours a week);
b seven hours a day for night-time work (42 hours a week); and
c seven-and-a-half hours for a mixed work shift (45 hours a week).

The FLL also provides that employees are entitled to at least 30 minutes of rest or to have a meal during their shift, and this time shall be considered as part of their working day. It will also be considered as part of the employees' working day if they are not allowed to leave the workplace during this time. However, there is new case law stating that the rest or meal period must be at least 60 minutes, which cannot be considered part of the continuous work shift. Although the FLL has not yet been updated to reflect this change, employers must comply with the new requirements. This means modifying work shifts or running the risk of operating work shifts that surpass the limits established by law, as a 30-minute extension per day would now be considered working time.

Even though the statutory daily shift for daytime work is a maximum of eight working hours, the law permits both parties to distribute the maximum of 48 hours in such a manner that allows employees to enjoy an extra day of rest. Thus, employees would be able to work for more than eight hours per day as long as they do not exceed the statutory maximum of 48 hours in a week.

Any time worked in excess of the mandatory 48 weekly hours will be deemed overtime and employers shall pay for any overtime worked.

The FLL foresees seven working hours for employees hired for night work. Nevertheless, there is the possibility of both contracting parties agreeing on the distribution of shifts to allow the employees to have an extra day of rest. In this case, the maximum weekly working hours for the night shift is 42, and any time worked in excess of that will be deemed overtime.

The FLL also states the working hours for the three work shifts:

a daytime: between 6am and 8pm;
b night-time: between 8pm and 6am the next day; and
c mixed: covers periods of both day and night shifts, as long as the night-time period is less than three-and-a-half hours. If an employee working a mixed shift works more than these three-and-a-half hours of night work, the shift shall be deemed a night shift and be subject to the statutory maximum of 42 working hours a week.

For teleworking and remote working, the amendment bill establishes that employers must honour employees' right to disconnect after finishing their respective working shifts; otherwise, they will be entitled to overtime under the terms of the FLL, as described in Section VI.ii.

ii Overtime

Pursuant to the FLL, all employees are entitled to overtime pay if they have worked for more than the statutory hours of the work shift for which they were hired. It also provides that an employee may not work more than three extra hours daily and for no more than three days per week (a total of nine legal extra hours per week). The employer must pay the employee

double salary for the hours of legal overtime worked. Futhermore, for any extra time worked in excess of nine hours during one week, the employee will receive triple salary, despite the fact that employers could be sanctioned by the administrative labour authorities for having their employees work for more than nine overtime hours per week or more than three times per week.

Even though, as a matter of law, all employees are entitled to overtime pay, it has become customary for employees holding managerial positions not to claim any overtime pay, because it is implied that their salary already includes and covers the extra time they need to work in view of the activities their job entails. Nevertheless, this should not be understood to mean they are not entitled to overtime pay, because it is possible under the FLL to claim overtime pay with the labour boards. However, material or manufacturing (blue-collar) workers commonly receive overtime pay whenever they work overtime, up to the maximum overtime allowed by the FLL and the corresponding salary for the extra hours worked.

Overtime compensation is paid with the salary and any other benefits to which the employee is entitled for the particular period. Employers have to be vigilant about paying overtime in a timely manner; otherwise, employees are entitled to claim for outstanding pay before the labour boards.

VII FOREIGN WORKERS

Pursuant to the FLL, a company's workforce should include at least 90 per cent Mexican workers but the remaining 10 per cent of positions can be filled by foreign workers. Technical and professional workers must be Mexican, except in those cases where the activities to be performed are so specialised that no Mexican workers with the required skills are available. This requirement does not apply to directors and general managers. Another exception to the rule is that physicians, railway employees, employees on any Mexican vessel and civil aviation crews must be Mexican nationals.

Foreign employees have the same labour, social security and tax rights and obligations as Mexican employees. Employers have to register foreign employees with the Social Security Institute and deduct from their salaries the corresponding amounts for social security contributions and taxes in the same terms as Mexican employees. Foreign employees must also file their tax returns according to the applicable laws.

For a foreign national to work in Mexico, the corresponding working visa must be obtained from the National Immigration Institute. For these purposes, the employer must be registered as an employer with the Institute.

Pursuant to the FLL, foreign employees shall earn the same salary and benefits as Mexican nationals who perform the same activities in the same position and work shift, and under the same efficiency conditions. Finally, Mexican nationals must be favoured over foreign employees when applying for a promotion under equal circumstances.

VIII GLOBAL POLICIES

The FLL requires that any disciplinary measure has to be set forth in the company's internal work regulations, which have to be drafted and signed by a joint commission, comprising an equal number of representatives of both the employees and the employer. For the regulations to be enforceable, the law requires that they be submitted to the labour boards for approval and registration. If employers enforce any disciplinary measures foreseen in the regulations

without them being registered with the labour board, these disciplinary measures will be deemed illegal and the employees may be entitled to file a claim with the labour boards against the measures.

The regulations have to be written in Spanish and must contain the requirements provided by the FLL and the disciplinary measures, which cannot exceed those foreseen in the statute. A reference to compliance with the regulations must be included in the employment contract to make employees aware of the regulations. As mandated by law, employers have to make sure employees know and are fully aware of the content of the regulations by making them as visible as possible, either on a bulletin board or intranet, or posting them in a visible place in the workplace or by giving a copy to each employee.

In addition to the aforementioned, it has become a common practice in Mexico for foreign companies to set up their own handbooks and global policies. It is not required to register these documents with the labour boards. In this regard they would not be deemed enforceable over the internal work regulations and their validity would be contingent on not contravening the FLL and the internal work regulations. It is advisable that, for a company to be able to enforce its global policies, the internal work regulations should incorporate them, by reference, as part of the regulations and guidelines that must be observed by employees.

IX PARENTAL LEAVE

The FLL establishes that employers are obliged to grant working men paternity leave of five working days with pay, following the birth of a child or the adoption of an infant. Mexican labour legislation also sets forth that, in the case of adoption, working women are entitled to six weeks of paid leave, which shall be enjoyed immediately after they receive the infant.

Further, the FLL provides that working women shall enjoy six weeks of rest before their confinement and six weeks of rest after delivery. At the express request of the employee, and prior written authorisation from the doctor of the corresponding social security institution or, where appropriate, the health service granted by the employer, taking into account the opinion of the employer and the nature of the work performed, she may transfer up to four of the permitted six weeks of rest before the birth after it. In the event that a child is born with any type of disability or requires medical attention in hospital, the rest period may be extended up to eight weeks after delivery, upon presentation of a medical certificate.

X TRANSLATION

The FLL does not state that employment documents have to be translated into any particular language. However, given that Spanish is the official language in Mexico, it is always advisable to have the documents drawn up in Spanish. Nevertheless, if a company requires a document to be written in an employee's native language, it can be done, but it is advisable to have another copy of the contract or document in Spanish.

The sole exception to this is the requirement to accompany any document written in a foreign language that must be submitted in a labour trial with a translation into Spanish. If the party that submitted the document in the trial does not provide the corresponding translation, the labour board may reject admission of the document.

XI EMPLOYEE REPRESENTATION

The FLL does not foresee the formation of works councils. Nevertheless, it imposes the obligation on both employers and employees to form different commissions to deal with particular issues in the workplace, such as training, health and safety, drafting internal work regulations and profit-sharing payments.

In addition to this, the Constitution and the FLL guarantee the right of employees to form or join a union for representing and defending their interests before the employers and to have the union execute a collective bargaining agreement (CBA) with the employer for the purpose of setting up the terms and conditions of the employment of unionised employees. CBAs are to be negotiated and restated each year with regard to the salaries of unionised employees, and every two years in connection with the employment terms and conditions for these employees. The most important right, and leverage, for unions forcing employers to negotiate CBAs, and to comply with their terms, is the right to call for a strike and to stop activities until their demands are resolved.

XII DATA PROTECTION

On 5 July 2010, the federal government published the Federal Law on Protection of Personal Data Held by Private Parties (DPL) in the *Official Gazette of the Federation*, which has been in force since 6 July 2010 and is intended to protect personal data held by private parties – either companies or individuals – to regulate the lawful, informed and controlled treatment of personal data, with the objective of ensuring the right to privacy and the right of informational self-determination.

To clarify the content of the DPL, on 21 December 2011, the federal government published in the *Official Gazette of the Federation* the Regulations of the DPL (the Regulations), which have been in force since 22 December 2011. Among other matters, the Regulations establish in detail the conditions for the compliance and enforcement of certain provisions of the DPL, providing legal certainty to its regulated subjects.

The DPL and the Regulations protect personal data that is processed by private parties at a national level; per the DPL, 'processing' entails the obtention, access, administration, use, disposition, disclosure and storage of personal data through any means available, as well as the national and cross-border transfer thereof. Both regulatory instruments directly affect employees (data subjects), either by strengthening their right to privacy and data protection in relation to their employer and its subcontractors, or by establishing duties with which they must comply to preserve the protection of the personal data that is processed in the course of their activities.

Furthermore, employers need to fulfil diverse obligations to comply with the provisions of the DPL and the Regulations. First and foremost, when processing personal data, employers must abide by the principles of lawfulness, fidelity, fairness, consent, notice, quality, proportionality, purpose and accountability, and with the duties of confidentiality and security.

Consent is the only lawful basis for the processing of personal data in Mexico by private parties, with certain exceptions set forth by law. This means that, for the collection and processing of personal data, the general rule is that the data subject must (1) be informed

by means of a privacy notice[3] about the personal data to be processed, the purposes for the processing, the personal data transfers and the means to exercise their access, rectification, cancellation and opposition rights, among other specific information established in the DPL and the Regulations, and (2) consent to the privacy notice. Data subjects can provide their consent explicitly (i.e., verbally, in writing, electronically or through any other technological means available) or tacitly, if a data subject has 'access' to a privacy notice and expresses no opposition to it. To process financial personal data or any other data relating to patrimony, controllers require a data subject's explicit consent; and when processing sensitive personal data, controllers require the explicit and written consent of the data subject, through handwritten or digital signature or other identification procedure. All other personal data may be processed with the data subject's tacit consent.

In line with the exceptions set forth in the DPL, the data subject's consent is not required for the processing of personal data if it is necessary to comply with obligations derived from a legal relationship, such as a labour contract, entered into by the data subject (employee) and the data controller (employer). Candidates for employment do not fall within this exception as they do not have any legal relationship with the employer, so their consent is required if their personal data is to be transferred to a third party.

Under Article 48 of the Regulations, the employer is compelled to implement, as a minimum, the following measures to comply with the accountability principle:

a developing binding and enforceable privacy policies and programmes within the organisation;

b implementing a training, update and awareness programme for staff in respect of the personal data protection obligations;

c establishing a system for internal supervision and monitoring, verification or external audits to verify compliance with privacy policies;

d allocating resources for the implementation of privacy programmes and policies;

e establishing a procedure to deal with the risks to personal data protection when implementing new products, services, technologies and business models, and to mitigate them;

f reviewing security policies and programmes periodically to determine whether any modifications are required;

g establishing procedures to receive and respond to queries and complaints from data subjects;

h providing mechanisms for the enforcement of privacy policies and programmes, as well as for sanctioning non-compliance;

i establishing measures for the protection of personal data, that is to say, a set of technical and administrative actions that guarantee the controller's compliance with the principles and obligations set forth by the DPL and the Regulations; and

j establishing measures for the traceability of personal data, that is to say, actions, measures and technical procedures that allow for the tracking of personal data while it is being processed.

3 On 17 January 2013, the Ministry of Economy published in the *Official Gazette of the Federation*, with the collaboration of the National Institute for Transparency, Access to Information and Personal Data Protection, the Privacy Notice Guidelines, which provide guidelines in connection with the content and scope of privacy notices, establishing in detail the elements that a privacy notice must include, the forms of privacy notices and the ways to inform them to data subjects, among other things.

In line with these measures, privacy regulations should be considered in a company's internal labour regulations, so as to enforce sanctions for infringement.

Article 19 of the DPL and Chapter III of the Regulations also provide that controllers must implement and maintain administrative, technical and physical security measures to protect personal data against damage, loss, alteration, destruction, use, access or unauthorised use. Employers, as data controllers, must consider the following actions, among others, when implementing and maintaining security measures: (1) create an inventory of the processed personal data, which, according to non-binding recommendations by the Mexican data protection agency (the National Institute for Transparency, Access to Information and Personal Data Protection (INAI)), should identify the nature of the personal data and its 'flow'; (2) identify the functions and obligations of the employees who process personal data; (3) carry out a risk analysis and a gap analysis; and (4) establish and implement any missing security measures.

i Requirements for registration

Under the terms of the DPL and the Regulations, there is no obligation to register an employer, in its role as data controller, with the INAI or any other government body.

ii Cross-border data transfers

Under the terms of the DPL and the Regulations, employers, as data controllers, are not compelled to register their data transfers with the INAI or any other government agency and, as a general rule, data transfers are subject to the consent of the employees as data subjects, as explained above, and other formalisation requirements. However, Article 37 of the DPL establishes a few exceptions in which the employee's consent is not required for a data transfer, which include whether the transfer is:

a necessary for preventive treatment or medical diagnosis, the delivery of healthcare, medical treatment or the management of health services;

b to a controlling company, subsidiary or affiliate under the common control of the controller, or to a parent company or a company of the same corporate group as the controller, operating under the same internal processes and policies;

c necessary under a contract that has been concluded, or a contract to be concluded by the employer and a third party, in the interests of the employee; or

d necessary for the maintenance or fulfilment of a legal relationship between the company and the employee.

Neither the DPL nor the Regulations require safe harbour registration for data transfers or for carrying out an onward transfer.

iii Sensitive and financial personal data

Under the terms of Section VI of Article 3 of the DPL, sensitive personal data is defined as that which pertains to the data subject's most intimate sphere, or personal data that, if misused, could lead to discrimination or cause a serious risk to the data subject. In particular, personal data is considered to be sensitive if it relates to racial or ethnic origin, current or future health status, genetic information, religious, philosophical and moral beliefs, union membership, political opinions and sexual preference.

Financial and economic data is not considered to be sensitive personal data; however, as explained above, the processing of this type of data requires the express consent of the data subject, except as provided by law.

The processing of sensitive data is more stringent than for non-sensitive data. Pursuant to Article 16 of the DPL, when sensitive personal data is collected, the privacy notice must address explicitly that the controller collects and processes this type of data. Furthermore, Article 9 of the DPL states that no databases that contain sensitive data should be created without justifying their creation for legitimate purposes, concrete and consistent actions, or explicit purposes pursued by the controller.

If infringements to the DPL are committed when sensitive data is being processed, fines can be increased to twice the established amounts, under the terms of Section IV of Article 64 of the DPL.

iv Background checks

Under the DPL and the Regulations, background checks, credit checks and criminal record checks are allowed if the candidate for employment has granted his or her express and written consent, as such records should be considered as sensitive data.

XIII DISCONTINUING EMPLOYMENT

i Dismissal

It is not easy to terminate an employment relationship in Mexico owing to the principle of 'employment stability' governing employment relationships. This principle shall be understood to mean that no employment relationship can be terminated at the will of an employer unless it is for one of the causes for termination foreseen in Article 47 of the FLL. Regardless of these causes, the contracts of employees with more than 20 years of servicee can only be terminated when the causes are particularly serious (although the FLL does not provide what can be classed as serious), or when employees have repeatedly violated their obligations or committed different violations.

There is also cause for termination in respect of trusted employees,[4] particularly when an employee commits any act that leads to the employer losing confidence or trust in him or her. Notwithstanding the foregoing, typically, employers will link a loss of trust with any other cause or causes in the terms of Article 47 of the FLL.

Before the amendments to the FLL published on 1 May 2019, when lawfully terminating an employee's contract under a statutory cause, the employer would provide him or her with a written notice stating the cause, or causes, for termination and the dates on which the actions took place, or file it with the corresponding labour boards within five days of the termination date for that authority to deliver it to the employee. In this case, the burden of proof is on the employer regarding the causes for termination stated in the corresponding notice; however, with the amendments to the law, the obligation to provide a written notice will no longer be applicable, since it will be sufficient that the employer proves before the labour authorities that it terminated the employment relationship for a statutory cause, under the terms of the FLL.

4 A trusted employee is any individual who performs activities of management, oversight and inspection within the workplace.

When terminating an employee's contract with sufficient cause, the employer has to pay only the accrued salaries, benefits and seniority premium.[5] If the employer fails to prove the causes for termination or taht the termination notice has been delivered to the employee, the termination shall be deemed unjustified as a matter of law regardless of the cause, and the employer must reinstate the employee in his or her role or tender severance pay, which shall consist of (1) three months' daily integrated salary,[6] (2) 20 days' daily integrated salary for each complete year of service, (3) a seniority premium, and (4) accrued salaries and benefits owed to the employee, such as vacations, vacation premium, Christmas bonus, among others (such as a saving fund, food allowance, gas allowance, punctuality bonus, attendance bonus).

As proving the causes for termination and the delivery of the termination notice is difficult, it has become common practice for employers to negotiate settlements with their employees, which can be documented by either:

a having the employee address a unilateral communication to the employer advising of his or her voluntary separation from the job (i.e., a resignation letter) and a signed document that evidences the breakdown of the benefits paid to and received by the employee (i.e., release receipt); or

b executing an employment termination agreement. This document can be ratified by the parties with the corresponding labour board; however, it is not mandatory.

The option under point (b) provides the parties with added legal security since the document issued as a result of ratifying the termination agreement with the relevant authority has the effect of an official ruling.

ii Redundancies

Whenever an employer wishes to make an employee redundant, it has to follow the same process of dismissal or termination without cause as described in Section XIII.i. There is no need to notify the government or the employee's union about the redundancy (unless otherwise provided in the CBA), and no social plan, offers of alternative employment or notifications to the employees are required. When a case of redundancy arises, the common practice is to offer the employee full statutory severance pay in exchange for the execution by the employee of the corresponding termination documents (termination agreement or resignation letter and release receipt).

For collective redundancies, based on the principle of employment stability governing all employment relations in Mexico, the FLL foresees this kind of redundancy in the following situations:

a *force majeure* or act of God not attributable to the employer or, if the employer is an individual, his or her physical or mental disability, producing the necessary, immediate and direct termination of the employment relationship;

b unaffordability of the business;

c exhaustion of the subject matter of the extraction industry;

d causes foreseen in Article 38 of the FLL (mining-related causes); and

5 Equivalent to 12 days of salary per year of service or proportional part thereof, with a cap of twice the daily minimum wage applicable in the geographical zone where the services were rendered.

6 According to the Federal Labour Law, an integrated salary comprises any and all entitlements or payments in cash or in kind granted to the employee for the previous 12 months.

e a legally declared bankruptcy of the employer, if the authorities or creditors resolve the definitive closure of the company or a definitive reduction of the company's activities.

Carrying out a collective redundancy would have to be performed through the corresponding special proceeding provided by the FLL and the severance payment would be limited to three months' integrated salary, omitting the payment 20 days of integrated salary per year of service. However, it is important to take into consideration that any collective redundancy can be carried out other than through the special proceeding provided by the FLL, in which case a full severance payment must be paid, including three months' integrated salary, 20 days' integrated salary per year of service and a seniority premium.

When redundancies are the result of the implementation of new production processes involving new automated technologies or the installation of new machinery in the workplace, employees are entitled to four months' integrated salary plus 20 days' integrated salary per year of service, and the salaries and benefits accrued.

XIV TRANSFER OF BUSINESS

Mexico does not have business transfer laws that protect employees affected by a merger, acquisition or outsourcing transaction as in other jurisdictions. However, the FLL contains a provision that regulates the transfer of employees from one employer to another as a result of a corporate buyout or restructuring of a business. This transfer must take place on a date agreed by the parties (employers). Furthermore, the transfer of employees shall take place whenever the whole or the main part of the business is also transferred. This type of transfer is known as an employer substitution, which is a legal proceeding whereby an employer assumes any and all obligations of the former employer of an individual or group of individuals without terminating, suspending or modifying the terms of the original labour relationship.

Under an employer substitution, the existing employment relationships, and the terms and conditions attached to them (salaries, benefits, work shift, etc.) cannot be reduced or changed unilaterally by the new employer. If they are somehow affected, employees are legally entitled to claim via the labour boards the granting or observance of their corresponding salaries, seniority, benefits and conditions, or even to terminate the labour relationship with cause and with responsibility being on both the former and the current employer.

Employment substitutions do not require the employee's or, if applicable, the union's consent to be effective and do not trigger any severance payments (unless there is any change in control agreements executed with some employees). The law requires employers to deliver a substitution notice to the employees and to the Social Security Institute (note that the Institute will automatically advise the National Fund for Workers' Housing of the substitution).

The FLL and the Social Security Law provide that the former (substituted) employer is jointly liable with the new (substitute) employer for six months for any employment and social security obligations existing before the effective date of the substitution.

Finally, the FLL contains a provision that forbids the transfer of employees in a deliberate manner with the purpose of reducing their labour rights. In such a case, the employer would be subject to relevant fines and potential labour claims against it.

In addition to the employment substitution process, a termination and rehire process may also take place as a transfer mechanism for employees. In that sense, the employment benefits that will be triggered on implementation of this mechanism will vary depending on

the terms and conditions with which these employees will be hired by the new employer. As a result of this transfer mechanism, all past liabilities generated between the transferred employees and the former employer will not be transferred to the new employer.

XV OUTLOOK

There has been considerable continued progress in labour matters during the past year, specifically relating to new outsourcing and tax regulations, the constitutional reform of labour legislation, and the changes to the labour boards as a consequence of this reform, providing more flexibility to employers in the context of a historically overprotective law. Key topics for 2021 are likely to be the transition process from the current administration of justice model to the new model as a result of the reform to the labour legislation; more stringent requirements for valid outsourcing structures; and the commencement of operations by the Federal Conciliation and Labour Registration Centre.

Appendix 1

ABOUT THE AUTHORS

JORGE MONDRAGÓN

Gonzalez Calvillo, SC

Jorge Mondragón has 27 years of experience in providing comprehensive legal advice to foreign and domestic companies, including in corporate and transactional labour matters. He is the founder of the firm's labour practice, has a business-oriented style and a strong corporate core, which enables him to provide labour advice with an understanding of the clients' needs.

He also has ample experience in cross-border matters, relating to business development, including corporate start-ups, franchise expansion and training programmes, and of corporate foreign policies to comply with Mexican law. His legal labour practice includes preparing legal opinions to determine courses of action for employee management in Mexico (transfers, hiring, massive lay-offs, etc.), including the proper documentation of employment relationships through agreements, the implementation and adaptation of foreign corporate policies, and handbooks to ensure compliance with applicable Mexican frameworks.

LUIS ENRIQUE CERVANTES

Gonzalez Calvillo, SC

Luis Enrique Cervantes has more than 16 years of experience in private labour law practice, advising clients in every aspect of labour, employment, social security and benefits law. Also, he has been involved in hiring processes, individual and collective bargaining agreements, executive compensation programmes, expatriate management, pension plans, labour restructures, employment termination, massive lay-offs, complex labour and employment litigation, including strategic defence representing companies in labour claims filed by employees.

He also has ample experience of undertaking due diligence procedures assessing the labour and employment risks and contingencies for investors, and providing support in transactional work, including mergers and acquisitions. Among other things, he has experience in representing clients in the telecommunications, entertainment, automotive, aeronautical, financial and mining industries.

Also, his international experience includes undertaking an internship programme at the Cleveland, Ohio, office of the law firm Jackson Lewis PC.

FERNANDO DE BUEN

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Fernando de Buen has more than 10 years of experience in private labour practice. He has represented both national and foreign companies in everything concerning the drafting and negotiation of individual employment agreements for expatriates, executives and regular employees and the hiring strategies for both national and expatriate employees, as well as the termination of employment relationships of high-level executives and employees (both individually and collectively), as well as the planning and execution of employee transfers.

He has successfully participated in the design of compensation and benefits for both executives and employees; the negotiation and termination of collective bargaining agreements; and the corresponding advice to enable companies to comply with all the requirements mandated by the applicable labour laws according to the Labour and Social Welfare Ministry (both federal and local), including internal employment audits. He has also advised leading companies regarding highly complex consultancy, as well as the opening, expansion or restructuring of operations in Mexico, which may originate from mergers and acquisitions; co-investment agreements (joint ventures); and the development of new subsidiaries through audits regarding compliance with their labour and employment obligations (due diligence). Furthermore, he has advised companies with respect to the implementation of employment obligations in the creation of new companies, the analysis of the consequences derived thereof, and the planning of labour and employment strategies to carry out the closing of business operations.

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