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# Basic Legal Aspects

# on

# Labor Law, Hiring, Outsourcing, Fringe Benefits, Termination ad Labor Unions

# in

# Mexico

## CONTENTS

These Guidelines are based on 30 years of experience in this field. They provide general information and selected comments on legal issues of interest to our Clients. The following contents are not a comprehensive treatment of the subject matter covered and is not intended to provide specific legal or tax advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein

## I. LABOR LAW, HIRING, OUTSOURCING, FRINGE BENEFITS, TERMINATION, LABOR UNIONS.

This Brief includes the recent Labor Reform to the Mexican Labor Law published on November 30, 2012 (the "Amendment") entering into effects on December 1st, 2012.

The Labor Law provides for the minimum rights of employees. The Law in general favors employees.

The Law does not accept employment "at will", so termination at will is not possible. Therefore, is advisable to have well drafted labor agreements that well define and limit the rights and obligations of employees, such as trial and training periods, schedules, work place, scope of employee's activities, overtime, confidentiality obligations, etc.

The success of any business operation in Mexico will depend upon the quality of the individuals hired, and on how they will be hired. That is why, if possible, we recommend previous "employment screening" and "background checks" before hiring, particularly at positions of trust.

### 1. FOREIGN EMPLOYERS WITH EMPLOYEES RESIDING IN MEXICO:

The Labor Law also applies to employees that work in Mexico who are foreign or Mexican, who are hired by a foreign employer.

When a foreign national resides in Mexico for more than 183 days within a 12 month period such foreign employee is solely responsible for registering with the Mexican tax authorities, obtaining a tax ID, and filing monthly and annual tax returns.

A foreign employer who is an employer is not obligated to make withholdings on employees residing in Mexico.

The foreign or Mexican employee who fails to comply with such registrations and tax filings will be subject to penalties and surcharges. The foreign employer residing abroad will not be jointly liable.

Notwithstanding the foreign entity employer will be regarded as such for all other labor-related obligations such as severance payments.

### 2. PERMANENT ESTABLISHMENT FOR TAX PURPOSES (MEXICAN BRANCH):

Foreign companies must be careful of not giving to their local employees in Mexico powers of attorney to enter into business contracts on their behalf.

If an employee residing in Mexico enters into agreements, or otherwise engages and obligates the foreign resident company employer into business deals, the foreign employer it will be deemed to have a "permanent establishment" in Mexico for tax purposes, and considered to be "doing business in México" and "de facto" will create a branch of the foreign company in Mexico.

In such case, the foreign company employer will be obligated to pay Mexican corporate income tax, and subject to all the Mexican tax system.

### 3. SALES AGENTS OR PROMOTERS:

This will not occur if the employee residing in Mexico will only "promote" the goods or services of the foreign resident employer.

In this case the employee can take orders and receive payments from customers, but never accept orders, or engage the foreign resident employer.

Sales agents or sales promoters, or similar agents, are considered employees when their activity is permanent, except if they participate in isolated operations, or have other "clients" for whom they provide services, in which case they will be independent contractors.

## 4. LABOR LAW, DRAFTED IN FAVOR OF EMPLOYEES

The Labor law is "strongly" drafted in favor of employees, putting the employers in disadvantage. The success of any business operation in Mexico will depend upon the individuals who are hired, and on how they will be hired. Previous "employment screening" and "background checks" before hiring is recommended.

Examples of how the Mexican Labor law is drafted in favor of employees are:

- No employment "at will" (firing at will) is not possible;
- No legal obligation work "efficiently", unless the labor agreement has well drafted benchmarks, or in case of trial agreements, as indicated below;
- Outsourcing is limited by specialty and not for all the employees (see below);
- Employees are only terminated for a few statutorily defined reasons;
- Employees are always right until proven otherwise by the employer;
- Mandatory severance payments are steep;
- 10% profit sharing distribution (not applicable to the general manager); and
- Labor unions claim title to Union Agreement regardless of the employees' will.

## 5. DEEMED LABOR RELATIONSHIP ("Relación Laboral" Impuesta"):

Note a "labor relationship" is considered to exist if one or both of the following elements are present **(i)** subordination and **(ii)** economic dependency. The Labor Relationship will exist regardless of the existence of a written labor agreement or the will of the parties.

In general terms, subordination means the employee is following the directions and engages in the activities of the employer; and economic dependency means the income of the employee comes in more that 50% from the employer.

Once the Labor Relationship is established, the whole set of provisions of the Labor Law and others derived thereof (such as the Social Security Law and the Workers Housing Fund Institute Law) will apply to both the employer and the employee; and the employee may not waive them.

The Amendment prohibits working conditions that could imply discrimination based on ethnic background, nationality, gender, age, social status, health status, religion, migratory status and sexual preferences.

## 6. GENDER EQUALITY:

It prohibits requesting certificates of non-pregnancy for hiring women, as well as firing them for being pregnant.

Furthermore, it provides women who adopt a child the right to a six week leave with pay.

## 7. AFFILIATION TO INFONACOT:

Employers must affiliate their workplace before the INFONACOT (Workers Consumer National Fund Institute ["Instituto del Fondo Nacional para el Consumo de los Trabajadores"]) so that employees may be entitled to receive credit from INFONACOT, which is used for the purchase of consumer goods.

This obligation must be completed before December 1st, 2013 (12 months after the Amendment enters into effects).

## 8. EMPLOYMENT RELATIONSHIPS:

Under Mexican Labor Law the employment relationships are considered:

### A. INDEFINITE TERM

In principle all labor relations are for an indefinite term and cannot be terminated at will by the employer, unless it can be established that are for a defined project or a defined term.

### B. DEFINED PROJECT

Are labor relationships that are for a specific works. For example to built up a wall or for a bidding process, or assisting in the drafting of blueprints, etc.

### C. DEFINED TERM.

Define term relationships can only be held when they are warranted by the temporary "nature" of the project or work being performed, for example the temporary need to substitute another employee.

Usually define project and term relations go together

## 9. NEW TYPE OF EMPLOYMENTS RELATIONSHIPS:

The Amendment brought 3 (three) new types of labor agreements. In all 3 (three) cases, the employees will have the same rights (fringe benefits and social security) and obligations of indefinite term employees.

### A. SEASONAL AGREEMENTS

When the services required are for specific, periodic and discontinuous works, or which do not require the provision of services throughout the entire week, month or year. The labor agreement will be for indefinite term but the working period will be limited only to the specific season;

### B. TRIAL AGREEMENTS

"Trial Periods" to verify if the hired employee has the knowledge and skills needed for the position can be established in expected indefinite time labor relationships or labor relationships that exceed 180 (one hundred eighty) days.

The trial period can not exceed up to 6 (six) months for managing or technical positions, or 30 (thirty) days for the rest of the employees.

### C. INITIAL TRAINING AND TEACHING AGREEMENTS

These agreements are designed for an employee to acquire the necessary knowledge and skills needed for the position.

Training and teaching period can not exceed up to 6 (six) months for managing or technical positions, or 3 (three) months for the rest of the employees.

In Trial and Initial Training Agreements the employers may terminate the labor relationship without any responsibility if at the end of trial or training period the employee does not prove to have the necessary knowledge and skills needed for the position.

To that effect, Employer will need a favorable opinion of the Joint Commission on Productivity Development and Training (*Comisión Mixta de Productividad, Capacitación y Adiestramiento*) if Employer has more than 50 employees.

Trial or Training Periods can not be extended or applied simultaneously or successively, to the same Employee for more than one time, even if for different positions or once the employment relation is concluded and another one arises with the same Employer.

If once the Trial or Training Period conclude and the employment relation subsists, then the employment relationship will be considered for an indefinite term and the time of trial or training will be part of the seniority.

## 10. WORKING SCHEDULE

The Labor Law stipulates a maximum of 48 (forty eight) hours work week.

There are 3 (three) type of shifts:

(i) Day Shifts are 8 (eight) hours long, and take place are between 6:00 AM and 8:00 PM.

(ii) Night shifts are 7 (seven) hours long, and take place are between 8:00 PM and 6:00 AM.

(iii) Mixed Shifts are 7:30 (seven and a half) hours long, and comprise part of the Day and Night Shifts, but never more than 3:30 (three and a half) hours of the Night Shift schedule, otherwise it will be considered a Night Shift.

## 11. OVERTIME

It is possible to extend working shifts, though never exceeding 3 (three) hours daily or 3 (three) days a week. In this case, overtime will be paid at 100% (one hundred percent) over the corresponding wage for a shift.

If the overtime is over nine hours per week, workers will be paid 200% (two hundred percent) over the corresponding wage for a given shift.

We recommend to include in the labor agreement that for the employee to work overtime he/she should have prior written authorization from the employer. This because in labor trials the burden of the proof is on the employer, so this written requirement will shift the burden of the proof is on the employee.

## 12. DAILY WAGE

An employee should receive at least a minimum general daily wage as defined annually by the National Commission of Minimum Daily Wages.

Such daily wage is determined for geographical area and is calculated and published every year on the Official Gazette.

For Mexico City during 2013 the daily wage equals to Pesos MxCy$64.73, which represents approximately USD$5.00.

In practice, hardly any employer pays as low as the minimum daily wage, but is taken as reference.

## 13. SALARY PAYMENT PER TIME UNIT (PER HOUR)

With the Amendment, the per-hourly payment is now expressly regulated.

The per-hourly payment must be established in writing within the labor contract.

Under the Amendment an employee may not earn less than one minimum daily wage salary per day regardless if said employee worked less than the 8 (eight) hour shift.

Therefore, if an Employee works even for an hour, the Employee will earn the minimum daily wage. Such daily wage will not be fractioned.

## 14. FORM OF PAYMENT OF SALARIES

The Amendment recognizes and regulates existing forms of salary payments such as bank deposits, debit cards, wire transfers or payments by any other electronic mean.

## 15. FRINGE BENEFITS.

The Employee is entitled to receive minimum statutory fringe benefits. Such minimum statutory fringe benefits include:

### A. VACATIONS

Employees, who have completed one year of service, will enjoy an annual period of paid vacations which will not be less than 6 (six) days.

This period will increase in two working days per year until reaching twelve days, and after the fourth year or services the vacation period will increase in two days for every five years of service.

See the following Table for convenience:

| YEARS OF SERVICE | DAYS OF VACATIONS |
|---|---|
| **1** | 6 |
| **2** | 8 |
| **3** | 10 |
| **4** | 12 |
| **5-9** | 14 |
| **10-14** | 16 |
| **15-19** | 18 |

### B. VACATION PREMIUM

During the enjoyment of vacations period, employees must receive a 25% on top of their normal daily salary as vacation premium per each day of vacations.

### C. YEAR END BONUS:

Employees are entitled to receive a Year End Annual Bonus which shall be of at least 15 days of salary and must be paid before December, 20$^{th}$.

### D. STATUTORY HOLIDAYS:

The Mexican Labor Law establishes the following obligatory paid holidays throughout the country:

- January 1;
- First Monday of February on celebration of February 5;
- First Monday of March in celebration of March 21;
- May 1;
- September 16;
- Third Monday of November in celebration of November 20;

- December 25; and
- December 1 is an obligatory holiday every six years for the inauguration of new Federal Administration.

Most business offices, banks and large stores observe religious holidays. This includes the Thursday and Friday of Easter week, November 1 and 2, and December 12 (Virgin of Guadalupe).

### E. MATERNITY & PATERNITY LEAVE:

Women will enjoy a 6 (six) weeks paid leave before, and 6 (six) weeks paid leave after childbirth.

Women who adopt a child have the right to a 6 (six) week paid leave.

The Mexican Social Security Institute ("IMSS") will cover 100% of the employee last salary as long as her pregnancy is certified by the IMSS and the filing is complete to cover the dates considering her due date.

Therefore, these payments are also made by the IMSS and not by the employer.

The employer should require the employee to separate from her job during the pre-and postpartum periods (42 days delivery, 42 days after birth).

Said 6 (six) weeks leave periods may be extended to women if they are unable to work because of issues during pregnancy or childbirth. A medical certificate has to evidence that situation. In such extension cases, they will only receive 50% (fifty per cent) of their salary and for a period no longer than 60 (sixty) days.

Mothers may return to their previous post if no more than 1 (one) year has elapsed from the date of childbirth.

During pregnancy, women should not perform jobs that will require considerable efforts and represent a danger to their health in relation with their gestation period, such as lifting, pulling or pushing large weights, that produce trepidation, standing for a long time, or that may alter or could alter their psychological and nervous state;

Childcare services will be provided by the Mexican Institute of Social Security and the employer is not obligated to provide them.

Under the Amendment now male parents also enjoy a 6 (six) weeks paid leave in case of child birth or adoption.

Male parents also have the right to get a paid a paternity leave for 5 (five) days after the child is born or is adopted.

### F. ADAPTATIONS FOR PERSONS WITH DISABILITIES:

Workplaces with more than 50 (fifty) Employees must have appropriate facilities for access and labor use for people with disabilities.

Employers must adapt their facilities before December 1st, 2015 (36 months from entering the Amendments into force).

## 16. ALIMONY:

Under the Amendment now the Employer is obligated to inform the competent family court and the alimony creditors in the event the Employee ceases to provide services at the workplace, within 5 (five) working days after the Employee ceases working.

## 17. LABOR RISKS AND INDEMNITIES:

Ministry of Labor will be updating (i) compensations for occupational diseases, and (ii) valuate of permanent disabilities resulting from labor risks, by June 2013 (6 months from entering the Amendments into force).

## 18. PROFIT SHARING:

The employees are entitled to receive a 10% of the annual net pre-tax earnings of the Employer to be distributed among all employees other than certain high officers such as the general manager, general director (Profit Sharing Distribution).

## 19. SERVICES COMPANIES FOR THE EMPLOYEES (OUTSOURCING):

If the operation will have several employees many companies consider incorporating additional services companies or use the services of independent outsourcing companies for their employees.

Since employers are obligated said to said Profit Sharing Distribution the additional outsourcing company will reduce such Profit Sharing Distribution since such companies do not work on a profit basis but under a minimal labor cost plus basis.

## 20. OUTSOURCING UNDER THE NEW AMENDMENTS:

Labor outsourcing is now defined and is more strictly regulated.

Outsourcing is only accepted when an Employer/Contractor (Contractor) supervises the works or services of its employees performed in favor of a Company/Client (Client).

Outsourcing is not allowed when the Client deliberately transfers all of its Employees to the Contractor in order to reduce the employees' labor rights.

The Amendment provides 3 (three) requirements to be met so that the Company/Client is not vicariously considered as employer of outsourced employees:

(i) Contractor cannot cover the entirety of the activities of the work place of the Client. This means that Contractor cannot have all employees of the workplace;

(ii) Contractor must be in the position to justify the outsourcing services due to its specialized nature; and

(iii) Contractor cannot cover tasks that are equal or similar to those tasks already performed by employees of the Client.

If any of these 3 requirements is not met the employees of the Contractor working in the work place of the Client will be automatically considered employees of the Client for all labor and social security legal effects (including Profit Sharing Distribution).

In addition, Contractor must comply with the documentation necessary for its operations, its obligations before the Social Security Institute, hygiene and environment working conditions, among others.

When outsourcing becomes warranted, the Client must verify that the Contractor renders its outsourcing services in compliance with the Labor Law.

## 21. PAYROLL CONTRIBUTIONS FOR SOCIAL SECURITY.

Such contributions are made to: **(i)** the Mexican Social Security Institute – "IMSS", **(ii)** Institute of the National Housing Fund – "INFONAVIT" and **(iii)** Retirement Saving System – "AFORES". Payroll fees and taxes are deductible for income tax purposes.

### A. MEXICAN SOCIAL SECURITY INSTITUTE – "IMSS"

The Mexican Social Security Institute is the Governmental Agency that guarantees the employee's right to health and medical assistance.

The registration before the Mexican Institute of Social Security relieves the employer of any liability in connection with job-related illnesses or accidents and provides certain benefits to the employee and her/his dependants, including:

**i)** Medical and hospitalization insurance for any illness, accident or maternity;
**ii)** Insurance for disability, old age, unemployment during old age and death, and child care.

Social Security contributions go up to approximately 22.57% based on the payroll salary. They should be paid by the Employer at the Offices of the Social Security Institute by registering as an employer.

Social Security contributions must be withheld and paid by an employer and remitted to the Mexican Institute for Social Security every month.

Additionally, employers are required to contribute to their employees' Social Security. Both contributions will be based on a percentage of the employees' wages.

The following rates are applicable:

**i)** Sickness and maternity - approximately 8.75% by the employer and 1% by the employee;

**ii)** Invalidity- 2.80% by the employer and 3.125% by the employee; and

**iii)** Retirement fund, old age, severance pay- 5.150% by the employer and 1.125% by the employee.

### B. INSTITUTE OF THE NATIONAL HOUSING FUND – "INFONAVIT"

The Institute of the National Housing Fund is a financial institution whose basic objective is to provide mortgage credit in Mexico to low-income workers in private sector corporations.

The registration before the Mexican Institute of Social Security bind the employer to pay a bimonthly 5% fixed payroll tax on the employee's wage, and contributing to a federal program which objective is to provide benefits allowing its employees to more easily acquire a home.

### C. RETIREMENT SAVING SYSTEM – "AFORES"

The Retirement Savings System is a social security benefit additional to those established by the Law on Social Security. Employers, Government and Employees make contributions to form Employees Retirement Savings System; such contributions are made depend upon the payroll salary to the Retirement Fund Administrators.

The Retirement Fund Administrators are Mexican Financial Companies that specializes in managing and investing the Employees' savings for retirement.

## 22. PAYROLL TAXES

Employers that have personnel and pay them wages (in cash or in kind) must pay Payroll Taxes ("Impuesto sobre Nóminas"), and be registered under a State Registry to pay the local Payroll Tax at the rate determined in each State.

In the case of Mexico, D.F. (Mexico City), such Payroll Tax is a flat rate of 2.5%.

## 23. LABOR TERMINATION AND SEVERANCE PAYMENTS

The mandatory severance payments in case of termination of labor relationships are based on the current daily wage of the employee.

The concept of wage takes into account any type of premium, bonus, commissions or any other payment that the employee is entitled to receive from the employer, both in Mexico and abroad, derived from his/her labor relation including additional economic benefits provided by the employer, such as, a car, club fees, etc.

If the employee is compensated on the basis of commission for his/her services, to determine the daily salary from such commission, the total monies received from commissions in the last calendar year for such services will be divided by 365, or if the employee worked for less than a year the monies received will be divided by the actual period worked.

## 24. TYPES OF TERMINATION OF LABOR RELATIONSHIPS:

For paying severance a distinction is made between the types of labor termination:

**(a)** without fair cause;

**(b)** with fair cause; and

**(c)** by mutual agreement.

The indemnification rights that an employee could claim are different in each case.

### A. TERMINATION WITHOUT FAIR CAUSE.

Employees may be dismissed without "fair cause," as statutorily defined.

The term "fair cause" is narrowly defined basically to include only significant violations by employees of employment terms to the detriment of the employer.

A List of those "Fair Causes" are indicted below, under Termination with Fair cause.

In the event of dismissal without fair cause, the terminated employee will, at his/her option, have the right to:

i. Demand reinstatement, unless he/she is a trusted employee ("empleado de confianza"), in which case he/she will only receive payment of certain termination indemnities.

ii. The Labor Law defines trusted employees in the context of their responsibilities given the nature, importance and confidence of his/her services and his/her relation with the employer.

Sales agents, for example, are considered trusted employees.

iii. An employee not reinstated will be entitled to receive:

(a) Three (3) months of salary;

(b) Twenty (20) days of salary for each year of employment;

(c) Seniority premium equal to twelve (12) days salary per year of employment, with a maximum cap of twice (2) the minimum daily wage per day;

(d) Proportional share of vacation, Christmas bonus, and profit sharing for the year in which the employment was terminated; and

(e) Salaries accrued from the date of termination to the date of payment of indemnities.

**B. TERMINATION WITH FAIR CAUSE**

An employer may dismiss its employee at any time based on a fair cause (rescission). In such case, the employee, as trusted employee, can ask for the following accrued rights:

**C. TERMINATION BY MUTUAL AGREEMENT**

A termination by mutual agreement finalizes a labor relation without the fault or breach of obligations by any of the parties. In this case, the employee will be entitled to the following accrued rights:

i. Proportional part of the following payments for the year during which the employment was terminated, calculated as follows:

(a) Vacation: at least 6 working days to be compensated at 125% of salary per day;

(b) Christmas Bonus: at least 15 days of salary;

(c) Profit Sharing: 10% of pre-tax earnings of the company to be distributed among all employees depending upon the number of days worked in the year and the amount of salaries received in such year; and

ii. Seniority premium in the amount of twelve (12) days of salary per year of service, provided that the employee has completed 15 (fifteen) years of employment.

Experience has shown that an employee will typically not consent to a mutual termination unless the employer is willing to pay an additional termination indemnity.

Depending on the circumstances, such indemnity is usually less than what the employee would have received under a termination without fair cause.

A termination agreement to be entered into with the employee should be ratified by the local Labor Arbitration Board.

If the agreement is not ratified, theoretically such agreement could be open to challenge by the employee arguing unfair dismissal.

The Fair Causes under the Labor Law are the following, when the employee:

1. Provides false certificates or references or has claimed a capacity, abilities, or skills which lacks. The employer may only claim this cause of termination within 30 days from the time the employee started it services;

2. Performs, during labor time, incurred in lack of probity or honesty, violence acts, threats, slander, or bad treatment against the employer, relatives, or staff or administrative personnel of the company, except that provocation existed, or that the employee acted in self defense;

3. Performs any of the acts in the foregoing paragraph against its co-workers and as a consequence the discipline at the working place is altered;

4. Performs any the acts mentioned in paragraph 2, outside of labor time, against the employer or his family, or directive or administrative personnel, in a manner so grave that make impossible the continuation of the labor relationship;

5. Intentionally produces material damages during labor time or as a consequence its labor tasks, in either the premises, their infrastructure, in the machinery or instrumentation, raw materials and other objects related with the job;

6. Unintentionally but negligently directly produces any of the damages mentioned in the foregoing paragraph as long as they are grave;

7. Compromises the security of the working place or personnel because of his inexcusable imprudence or inattentiveness;

8. Performs immoral acts in the working place establishment or place;

9. Reveals manufacturing secrets, or publishes reserved matters, causing damage to the employer;

10. Has more than 3 (three) assistance faults during a period of 30 (thirty) days, without the employer's permission or with out a justified cause;

11. Disobeys the employer or its representatives, without a justified cause, as long as it relates to the agreed scope of work;

12. Does not adopt the preventive measures or to follow the indicated procedures to avoid accidents or diseases;

13. Attends the work place in a drunken state or under the influence of any narcotic or nerve-racking drug, unless, in the latter case, that there is a medical prescription that justifies it. Before the worker begins its labor; however the employee must give notice to the employer of such fact and present the medical prescription.

14. Has received a final court resolution imposing imprisonment so it impedes the fulfillment of the working relationship;

15. Incurs in lack of probity, lack of honesty, acts of violence, threats, injuries or improper treatment against clients or suppliers of the employer (added by the Amendment);

16. Incurs in sexual harassment within the workplace (added by the Amendment);

17. Lacks of the necessary legal documents (as required by the statutes and regulations) required for the rendering services, when attributable to the Employee (added by the Amendment);

18. Any other "similar causes" to the foregoing as long as they are of the same "gave level" and of "similar consequences" in relation the work in question; and

19. In case of "employees of trust", the employer may terminate if there exists a reasonable cause to loose confidence on the employee. The category of employee of trust will depend upon the nature of the functions developed, and not of the formal designation given to such position.

The functions of trust are normally the ones of direction, inspection, vigilance and investigation, when they have a general character, as well as those functions related with personal tasks for the employer within the company or establishment.

## 25. NOTICE OF TERMINATION

The notice of justified termination of the Labor Relationship by the Employer shall be personally delivered to the Employee at the time of dismissal or noticed to the competent Arbitration and Conciliation Board ("Junta de Conciliación y Arbitraje") within the following 5 (five) working days.

In case the notice is made through the Arbitration and Conciliation Board, Employer must indicate the last registered domicile of the Employee, so that the Board may deliver the notice in person.

## 26. ACCRUED WAGES

In case the Employee bring any claim for wrongful dismissal again Employer, now the obligation of the Employer to pay Accrued Wages (Salarios Caidos) is limited to 1 (one) year, provided that the Employee wins the claim against its Employer.

In this case the Employee will only receive as indemnity for Accrued Wages:

**(i)** An amount equivalent to 3 months of salary ("Fixed Indemnity");

**(ii)** 100% of accrued wages during the labor proceeding but limited (capped) for up to 12 (twelve) months ("Capped Variable Indemnity"); and,

**(iii)** As of the thirteen month and forward (had the proceeding continued), only the payment of a 2% monthly interest rate on the Fixed Indemnity plus the Capped Variable Indemnity, i.e. 15 (fifteen) months.

## 27. DILATORY TACTICS

There are new penalties to Attorneys who intentionally delay the labor proceeding. Such penalties vary from fines of up to 1,000 times the general minimum daily wage in effects at the time of imposing the penalty.

## 28. EXTRA JUDICIAL AGREEMENTS:

Employees and Employers are allowed to reach out-of-court agreements or settlements in order to conclude the employment relationships.

In such agreements, there should be a brake-down of the amounts to be delivered to the employee for salary, accrued fringe benefits, and profit sharing.

If the rights of the Employee are not affected, the Labor Court shall approve the agreement, which ratified by the parties shall have the effects of a definite award.

## 29. MEANS OF EVIDENCE IN LABOR PROCEEDINGS

New forms of evidence in a labor proceedings now include photographs, cinematographic tapes, finger print scanner registries, audio and video recordings, and information and communication technology means, such as, computer systems, optical electronic means, faxes, e-mail, digital documents, electronic signatures and passwords.

## 30. UPDATED FINES

The amounts of fines in case of failing to comply with Federal Labor Law were updated. In some cases the amounts were increased to more than 1600%, for example, fines consisting of 3 minimum wages were increased in to 50 minimum wages. That is why it will be important to timely comply with new provisions included by the Amendment.

## 31. LABOR UNIONS AND COLLECTIVE BARGAINING AGREEMENTS:

### A. LABOR UNIONS CLAIM TITLE TO UNION AGREEMENTS.

As mentioned labor unions will "claim" title to collective bargaining agreement (union agreement) independently of the employees' choice or will.

It is not mandatory/compulsory for a company to have an agreement with a Union in Mexico; however it is most recommendable for the reasons stated below.

The way the Mexican Labor Law is drafted and interpreted, allows any labor union to claim the Union agreement on a company, and the union, by such claim, can establish its own terms and charges.

Even though the Labor Law gives the impression that once the company has at least 20 employees, the employees can seek the protection of a labor union, in practice it operates differently.

The Labor Unions are the ones that pray on newly created companies (or companies without a labor union agreement) who claim title to the union agreement. Otherwise they will place the company in strike until it obtains the union agreement signed.

### B. ENTERING INTO A UNION AGREEMENT WITH A FRIENDLY LABOR UNION.

Therefore, when having several employees, in any trade (industrial, commercial or services) is important to ponder the possibility of entering into a union agreement with a "friendly" labor union.

This will insulate the company from a negative or aggressive labor union that will force the company to enter into a collective bargaining agreement and establish negative labor demands.

Entering into a union agreement with a friendly labor union is preventive measure.

Usually that is done through a "soft" or "sweetheart" agreement under which the Union will not disturb the Company, and just charge the annual fee. Such fee is calculated considering the number of employees involved. For example in the case of around 30 employees the cost will be between US$1,000.00 to US$1,500.00 per year.

An unfriendly labor union can claim larger quota and file for strike at the labor Board if such demand is not satisfied.

### C. EMPLOYEES CAN ALWAYS REQUEST TO BE UNIONIZED.

Also consider that the right to claim the protection of a labor Union is never waived, so if the employees are not unionized, they can, at anytime, approach a labor union and subsequently make the Company to enter into a labor union agreement.

The Union Agreement does not apply to trusted employees ("empleados de confianza") who have positions of trust and management in a company.

### D. EMPLOYEES SHOULD KNOW OF THE LABOR UNION AGREEMENT.

In our experience some employees get restless in belonging to a Labor Union because Labor Unions have a reputation of affecting the economy and business of the Company. Therefore they should receive an

explanation that the friendly labor union exists for their protection, and for the protection of the company, from an unfriendly labor union.

Sometimes the employees do not know that they are unionized. This is because the true negotiations are between the union leaders and the company. However, in principle the employees should be aware of the Union Agreement existence.

Note that the union agreement is filed before the Labor Board and any employee will have access to it.

Also any employee may ask its Employer for a copy of the agreement, and the employer cannot deny its review.

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We hope you find this information useful for your operations in Mexico.

Respectfully

**Jorge Santistevan**,
Admitted in Illinois, USA & Mexico
LLB, MCL, JD
Fulbright Scholar

**Santistevan & Duclaud**