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Mexico's Congress Approves Initiative to Reform the Labor Law: What the Reform Will Mean for Employers with Operations in Mexico

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After much debate before Mexico's House of Representatives and Senate, as well as public demonstrations both in support and in opposition, on November 13, 2012, Congress approved an initiative to reform the Federal Labor Law (FLL). The bill, which was initially introduced by President Calderon under a "preferred status" fast-track, and was modified in part by both the House and the Senate, has now been sent back to the President for review. It is expected that President Calderon will approve the reform before his presidential term ends on December 1. If the reform is promulgated, the FLL, which has not been subjected to any substantial modifications since 1970, will be transformed in significant ways that will have extensive implications for employers with operations in Mexico.

Summary of the Law Reform Initiatives and Their Potential Impact

Employment Relationship

If approved, the bill will add seasonal employment agreements and initial training agreements as new types of employment contracts, in addition to those already permitted under the statute (*i.e.*, employment contracts for specific work and for a definite or indefinite period).

The initial training employment agreements must establish a time period of three months, as a general rule, and six months, for executive positions. Additionally, a probationary period of 30 days, generally, and 180 days, for executive positions, will apply to employment agreements for an indefinite term.

Notably, the bill will add the requirement that, in order to avoid employer liability, the opinion of the Joint Commission for Productivity and Training must be taken into consideration before terminating an "initial training employment agreement" or an employment agreement subject to a probationary period. Requiring the opinion of the Joint Commission for Productivity and Training will likely result in a bureaucratic and potentially conflictive process.

Outsourcing

Having modified the President's bill substantially, Congress's bill, if enacted into law, will heighten the regulations on outsourcing (subcontracting) with severe implications to many employers.

Under the new law, "outsourcing" will be defined as follows:

The subcontracting regime occurs when work is performed or services are rendered through workers hired by and working under a contractor's control, for the benefit of a customer, whether a legal or natural person, and the customer sets the tasks for the contractor and supervises the contractor in rendering the services or performing the contracted work:

This type of work must comply with the following conditions:

- It cannot cover the totality of the activities, whether equal or similar in totality, undertaken at the center of the workplace.
- It is justified due to its specialized character.
- It cannot include tasks equal or similar to the ones carried out by the customer's workers. If these conditions are not met, the customer will be deemed to be the employer for purposes and effects under the Law, including as it applies to obligations related to social security.

The reform initiative also establishes new requirements, including that the contract must be in writing and that the customer (or beneficiary of the services) must ensure that the contractor complies with its obligations under the labor law. It further provides that the subcontracting regime will not allow the transfer of workers from a customer to a contractor, for purposes of undermining any right under the labor law.

The wording of these regulations is ambiguous at best. For example, must the three conditions be met in order for the customer not to be deemed an employer or would one condition suffice? Many of these conditions are difficult to determine and impractical in their application. Agreeing on concepts such as principal activities, specialized character, and other similar concepts will likely generate many conflicts and litigation.

Furthermore, in practice, the proposed outsourcing regulations will substantially impact employers in several important ways. At risk are many companies that do not necessarily require direct manpower, but whose corporate structures depend on service companies to provide specialized functions. The cost of business will also increase for many business groups that have outsourced their entire workforce through service companies, when considering the company's profit-sharing obligations for an entire group of workers, as opposed to only for those that the company directly employs. These changes could therefore lead to the disappearance of many companies engaged in subcontracting or outsourcing, and the loss of a large number of jobs as a result.

President Calderon's original bill proposed imposing joint liability on companies that unlawfully use services providers to circumvent the labor law. Instead, the Congress's bill would appear to impose liability only on the company benefiting from the services and is silent on whether the contractor would be jointly liable, thereby creating a legal loophole on the contractor's responsibility. Imposing joint liability, as originally proposed by the President, would have been the most simple and practical solution.

Dismissal

If enacted into law, the reform initiative will add bullying and sexual harassment against any person in the workplace as new grounds for termination with cause. It will also simplify the notice of dismissal requirements, by allowing such notice to be delivered directly to the worker or through the corresponding Labor Board.

Back Wages

Back wages has been one of the issues of greatest concern to businesses, especially to small and medium-sized businesses. Currently, the prolonged duration of labor trials is the cause of massive economic liabilities due to the accumulation of back wages.

The bill limits the accumulation of back wages to 12 months. Once that period has concluded, a monthly interest rate of 2% will be generated on 15 months of the employee's monthly wage, which are to be paid once the process has concluded. Additionally, under the new law, the accrual of back wages will be suspended if the worker has died.

Payment of Wages

Currently, the FLL is silent on whether wage payments can be made by any means other than cash. Under the bill, employers will be allowed to utilize additional methods of payment of wages. With the employee's prior consent, an employer will be able to pay wages in cash or direct deposit into a bank account, debit card, transfers or through any other electronic means. This would provide workers with greater safety given the current circumstances.

The bill also seeks to formalize the option of paying for work at an hourly rate, under the condition that the income would never be lower than what would correspond to a day's work. This latter provision can be interpreted as being in harmony with the definition of minimum wage established by the Law, which would mean that the worker should receive at least the minimum wage, even when working fewer hours than the maximum established under the Law.

Training and Productivity

The bill also seeks to establish rules to make training mandatory for the employer as well as for the workers, with the express objective to increase productivity and optimization of human, material, and financial resources. It further suggests a correlation between increased wages and productivity and presupposes that training will increase and develop the worker's abilities, allowing him or her to carry out multiple functions.

Defining "productivity" as the result of optimizing human, material, financial, technological, and organizational resources already in existence in businesses, the bill requires agreements to measure and increase productivity, to which employers, workers, unions, governments, and academia would subscribe.

The reform initiative also seeks to regulate employees' promotions in several ways. First, it requires that a worker's capacity and productivity be considered above seniority. It further seeks to establish that a worker be promoted only if he or she is in the next lower grade or rank and is able to demonstrate greater training, seniority, aptitude, productivity, and fitness for the position. Additionally, it proposes the creation of a National Productivity Committee to assist the agencies known as the Federal Executive and Productive Workforce. The bill also requires that productivity committees be established at the state level.

Compliance with the new "productivity" requirement, if signed into law, should be monitored to ensure that it does not interfere with employers' plans to invest in technology, processes, and systems of production.

Union Democracy, Transparency and Accountability

Although the reform initiative did not approve all of the changes proposed by President Calderon, it does contain various changes that undoubtedly will promote union transparency and accountability.

Union Registration

If enacted, the new Law will require that the authorities in charge of union registration abide by the principles of impartiality, accuracy, freedom, immediacy, equity, and respect for union autonomy and democracy.

Union Democracy

Congress modified the President's original bill with respect to how unions' executive boards should be elected. The President sought to establish a voluntary, direct, and secret voting process. Congress's bill, however, will allow the general assembly to determine whether the voting should be "indirect and secret" or "direct and secret."

This language leaves open the possibility that the general assembly will continue authorizing union elections "by a show of raised hands," a practice currently followed by some unions. The more ideal scenario would have been to adopt the bill as proposed by the President.

Transparency

Congress accepted most of the provisions contained in the President's bill with regards to union transparency. If enacted, the law will require the following:

- Labor authorities will be required to disclose to duly authorized individuals union registration information, including the fully integrated bylaws and information about the union's domicile and executive board, among other information. Additionally, information and copies thereof shall be posted on the entity's internet page. This is fully congruent with Articles 6 and 8 of the Constitution.
- The Labor Board will be required to disclose, upon any person's request, information regarding the collective bargaining agreements filed with the Board, in accordance with the Federal Law of Transparency and Access to Governmental Public Information ("*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*").
- The Labor Board will be required to disclose the content of the internal work rules that are filed with the Board.

Union Accountability

In what represents great progress in this area, Congress adopted much of the President's bill on the issue of union accountability. If the bill is passed into law, every six months, each union executive board will be required to render to the assembly a report with a full and detailed account of the union's administration of its assets. The report will include the status of income generated by union dues and other property, and how it was allocated.

Further, this obligation will not be waivable and workers who identify irregularities or do not receive this information will be able to appear before internal courts, as provided under the statutes. A worker will be able to appear before the corresponding Labor Board where internal courts are not available or if the worker has not been provided with the information after exhausting the internal procedures. A worker who takes such actions will not lose his or her union rights, nor be expelled or separated from the union.

Repeal of the Closed-Shop Clause

The bill seeks to statutorily repeal the "Closed-Shop" Clause, both within the contexts of hiring and separation. This proposal represents great progress for freedom of association and is in line with the Federal Supreme Court's jurisprudence which pronounced its unconstitutionality.

Collective Disputes

Regrettably, Congress rejected the President's initiative to regulate collective disputes. For example, with respect to Collective Disputes of an Economic Nature, Congress rejected the proposal of "no suspension of the proceedings due to a call to strike."

Strikes

Congress also rejected the President's initiative to regulate strikes, which will result in no changes to the current legislation. The President's bill sought to prohibit corrupt practices in this area and, had it been adopted, it would have represented great progress within the labor and business contexts.

Among other proposals, the President's initiative proposed to terminate a strike through arbitration at the request of the employer. With Congress rejecting this proposal, the practice of infinite duration for strikes will be maintained, with negative consequences for both companies and workers.

With regards to calls to strike for the execution of a collective bargaining agreement, the President proposed requiring unions to prove the strike's legality, attaching information relative to the union's management and bylaws in order to verify that the industry or activity of the company with which it wished to execute the agreement is included in the union's corporate objective.

The President also sought to establish procedural requirements for claims over ownership of a collective bargaining agreement, which required the union attach a signed list of union workers that render services to the company and are affiliated with the union prior to the date on which the call to strike is filed.

Indeed, Congress's rejection of the President's original bill means that the entrenched corrupt practices of extortion and protectionist agreements will continue, to the detriment of both workers and employers. The labor reform in this area was of paramount importance for a true modernization of Mexico's labor legislation and it is regrettable that the House of Representatives omitted its revision.

Modernization of Labor Justice

Congress adopted most of the President's original bill, which would:

- Create a career professional service for the members of the Labor Conciliation and Arbitration Boards.
- Establish "Conciliation Officials" who will be in charge of the conciliatory process.
- Require that litigators hold a professional attorney's license or present a letter proving that he or she is a legal intern.
- Split labor trials into two hearings: the first stage consisting of the conciliation, demand, and objections phases; and the second hearing consisting of the proffer and admission of evidence phases.

Additionally, if enacted, the law will now allow the admission of electronic evidence.

Final Comments

Although Congress did not approve all of the reforms presented in President Calderon's original bill, the reform initiative that was sent to the Executive Branch nonetheless represents a milestone towards the establishment of a more modern and competitive labor framework.

Regrettably, the House of Representatives eliminated several initiatives of high importance, some of which are essential for a more advanced labor reform. The House also introduced several measures that arguably will inhibit employment and efficiency, as is the case with the outsourcing regulations that likely will promote informality in hiring practices. Of equal importance is that the House of Representatives rejected a substantial reform in the areas of collective disputes and strikes, which will allow the continuation of negative practices such as illegitimate strikes and the so-called "protectionist agreements."

In light of the broad implications of this reform for employers with operations in Mexico, some of which are identified above, employers should consult employment counsel to ensure that their practices and policies will be in compliance with the new law.

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