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Mexico Enacts Important Reforms to the Federal Labor Law

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Mexico's Federal Official Gazette today published a Decree that reforms and repeals various provisions of its Federal Labor Law (FLL). The reform will become effective on December 1, 2012, with some exceptions which are discussed below. The FLL had not been subjected to any substantial modifications since 1970. Accordingly, the reform has extensive implications for employers with operations in Mexico.

Below we provide a summary of the FLL reforms and their potential impact.

Employment Relationship

The reform adds 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 or to those exceeding 180 days.

Notably, the reform adds 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

The reform heightens the regulations on outsourcing (subcontracting) with severe implications to many employers. Under the new law, "outsourcing" is 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 service providers to circumvent the labor law. Instead, the reform 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

The reform adds 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 new law 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. With the reform, employers are now 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 reform also formalizes 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 reform establishes 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 new law requires agreements to measure and increase productivity, to which employers, workers, unions, governments, and academia would subscribe.

The reform regulates 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 establishes the creation of a National Productivity Committee to assist the agencies known as the Federal Executive and Productive Workforce. The reform also mandates the creation of productivity committees at the state level.

Compliance with the new "productivity" requirement 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

The reform requires 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

The reform allows the general assembly to determine whether the election of its executive board should be by "indirect and secret" voting or "direct and secret" voting. 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.

Union Transparency

The new law requires 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. Every six months, each union executive board is required to render to the assembly a report with a full and detailed account of the union's administration of its assets. The report shall include the status of income generated by union dues and other property, and how it was allocated.

Under the reform, this obligation is not waivable and workers who identify irregularities or do not receive this information may appear before internal courts, as provided under the statutes. A worker is 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 reform repeals the "Closed-Shop" Clause, both within the contexts of hiring and separation. This repeal represents great progress for freedom of association and is in line with the Federal Supreme Court's jurisprudence which pronounced its unconstitutionality.

Modernization of Labor Justice

The reform mandates the following:

- The creation of a career professional service for the members of the Labor Conciliation and Arbitration Boards.
- The establishment of "Conciliation Officials" who will be in charge of the conciliatory process.
- That litigators hold a professional attorney's license or present a letter proving that he or she is a legal intern.
- The bifurcation of 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, the reform allows the admission of electronic evidence.

Final Comments

Although the reform does not contain all of the proposals presented in President Calderon's original bill, it nonetheless represents a milestone towards the establishment of a more modern and competitive labor framework.

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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