

Labor and Employment Law

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U.S. businesses operating in Mexico through a Mexican subsidiary or otherwise employing Mexico-based personnel must comply with Mexican labor law.

Mexican labor and employment law is codified in the Mexican Constitution and the Federal Labor Law of 1970 (the "Law"). Mexican labor law is paternalistic and grants considerable legal rights and benefits to workers. For example, employees are entitled to mandatory profit sharing of 10 percent of the company's before-tax profits, may be terminated for only a limited number of justifiable causes, and enjoy the right to severance pay and seniority pay upon termination without cause.

Any person rendering services to another individual or entity is considered an employee if that person works under the supervision of, or is subordinate to the contracting individual or entity. Care must be exercised in drafting service agreements in which the intent is not to form an employment relationship.

INDIVIDUAL EMPLOYMENT AGREEMENTS

The Law requires that employers execute individual employment agreements with their employees. In Mexico, an employee's job is considered an "entitlement" and contracts are usually entered into for an indefinite term. If the contract does not specify the term, the law presumes it to be indefinite. Hiring for a definite term for a specific project is permitted if the nature of the job is truly temporary. Employment contracts for a trial period are not permissible beyond 30 days.

WAGES

The government is not empowered to mandate salary increases, with the exception of the minimum wage. Mexico's National Minimum Wage Commission periodically sets the minimum wage by geographical area. At present, the minimum wage in Mexico City (Region "A") is \$48.67 pesos per day, equivalent to approximately US\$4.42 per day. The Commission also sets specific ranges of minimum wages for a number of occupations.

WORK SCHEDULE AND OVERTIME

The Law establishes that the maximum number of hours in the work week depends on the shift:

- a) Day shift. From 6 AM to 8 PM, with a maximum of 48 hours per week.
- b) Night shift. From 8 PM to 6 AM, with a maximum of 42 hours per week.
- c) Swing shift. Includes hours from both the day and night shifts. Night shift hours may not exceed 3½ hours. If more than 3½ night hours are included in the shift, then it becomes a night shift. The maximum number of hours permitted per week is 45.

Employees are entitled to at least one 30-minute break per day. Companies may require workers to work overtime, but must pay them double for overtime hours. After the ninth hour of overtime in a given week, triple time applies.

Workers are also entitled to an additional 25 percent (on top of overtime) for working on Sundays.



REST DAYS

The Law grants workers one fully paid day of rest for each six days of work. Saturday work hours may be distributed among the other working days in the week. (For example, an employer may give its employees Saturday off but still require them to work 48 hours from Monday through Friday.)

Legal holidays are:

1. January 1 New Year's Day
2. February 5 Constitution Day
3. March 21 Benito Juarez Day
4. May 1 Labor Day
5. September 16 Independence Day
6. November 20 Revolution Day
7. December 1 Presidential Inauguration Day every six years (2006 is next)
8. December 25 Christmas Day
9. As determined by federal and state voting laws to enable citizens to vote (usually on Sunday)

QUESTIONS & ANSWERS

Question: may I employ foreigners (i.e., U.S. citizens/residents) in Mexico?

Answer: Yes, you may. Pursuant to the Law, at least 90 percent of a company's employees must be Mexican nationals, except for directors, administrators and other managerial-level employees. In practice, this rule is not significant because foreign nationals require proper immigration documentation to work in Mexico, and such immigration authorization is normally restricted to higher-level positions.

Foreign personnel are subject to the same legal requirements as Mexican employees and are treated equally, in terms of rights (including benefits) and obligations.

Question: can my Mexican subsidiary opt out of Mexican labor law by stating in its employment agreements that the agreement is subject to U.S. law and U.S. courts? What if I am employing my Mexican personnel through a U.S. company?

Answer: Since the employment relationship is between a Mexican company and a Mexican resident, Mexican employment law will apply automatically, regardless of what your contract states.

Employing a person through your U.S. company will likely make matters worse. If the employee legally resides in Mexico (whether foreign or Mexican) and he performs the contract in Mexico, then Mexican labor law will apply. Moreover, when a foreign company employs a Mexico-based employee, the foreign company will also be considered to have a permanent establishment in Mexico and therefore will be required to pay Mexican taxes.

Question: how can I fire an employee in Mexico?

Answer: An employer may justifiably terminate an employee without liability only if it can prove that the employee is guilty of one of the following acts or omissions:

- Dishonesty
- Mistreatment of employer
- Insubordination
- Disobedience
- Disclosure of trade secrets
- Three unjustified absences within a 30-day period

Proving cause in Mexican labor court, however, is extremely difficult, and in all cases must be based on direct evidence. Moreover, if after terminating an employee the employer fails to prove cause in court (as well as proper notice of termination), then the employer will be required by law either to:

1. Reinstatement of the employee and pay back wages; or pay the employee severance pay equivalent to 3 months' salary, back wages, and other mandatory payments.

Question: *what minimum benefits must I pay my Mexican employees under the Law? What is the approximate cost of these benefits?*

Answer: The cost of mandatory employee benefits is high relative to total payroll costs—between 35 and 40 percent of the base salary. The most significant mandatory benefits are the following:

- a) Paid vacation. After one year of employment, an employee is entitled to a paid vacation of six working days, which increase by two days for each of the next three years of service. Thereafter, the vacation period increases by two days for every additional five years of service. Workers are also entitled to a vacation premium in addition to their vacation days' salary in an amount equal to 25 percent of their daily wage. (For example, if a employee is entitled to 10 days' vacation, then for each day he is on vacation, he is paid 125 percent of the applicable daily wage.)
- b) Christmas bonus. Employees are entitled to an annual bonus of not less than 15 days' salary payable on or before December 20.
- c) Profit sharing. Profit sharing is compulsory for all businesses, regardless of size or organizational structure. Employees are entitled to receive an amount equal to the percentage determined by the National Profit-Sharing Commission. This percentage currently equals 10 percent of the taxable income as calculated for income tax purposes under the terms of the Income Tax Law. If a business' income is derived exclusively from personal services, the profit sharing is capped at one month's salary.
- d) Housing fund. Employers must contribute 5 percent of payroll to the National Workers' Housing Fund Institute. At this time, the base salary for contributions has a cap of 19 times the minimum daily wage in Mexico City. This cap will rise annually until it reaches 25 times the minimum daily wage in 2007. The housing contribution and social security payments into pension and retirement funds are part of the Retirement Savings Plan. Employees may use the funds to purchase, repair, or remodel their homes based on a preference policy followed by the Institute. The net fund balance, if any, will be paid to the employee in the case of total disability, retirement or death.
- e) Social Security. All employers must register themselves and their employees with the government Social Security Institute (IMSS). Social Security dues are paid by both the employer and the employee (via withholding) every month, based on the daily wage. This contribution is generally capped at 25 times the minimum wage. Social Security benefits cover job-related risks; general illnesses and maternity; disability and life; retirement, old age and unemployment at an advanced age; children's nurseries and social benefits.

Employer penalties for noncompliance with Social Security contribution requirements include fines from 70 percent to 100 percent of the omitted payments, plus interest and back payments.

Question: can I get around the strict Mexican labor law by hiring my personnel as “independent contractors”?

Answer: Generally, no. Many companies in Mexico, both foreign and local, try to avoid paying the mandatory benefits discussed above by hiring people as independent contractors under a service contract and paying them on a fees-for-services basis. However, regardless of whether or not the parties have signed such an agreement/clause, if a subordinate relationship exists between the individual service provider and the contractor, then Mexican law will determine that an employer/employee relationship exists. This relationship triggers the payment of all employee benefits required under Mexican labor and social security laws.

Question: can my employee waive the applicability of certain provisions under the Law?

Answer: Consistent with its paternalistic intent, Mexican labor law establishes that most contractual waivers of employee rights are void, including waivers of mandatory benefits, salary and rights upon termination. Employees are free, however, to sign voluntary resignations and settlement agreements in which they waive the right to sue and recognize that the employer does not owe them any back wages or benefits.

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