THE EMPLOYMENT LAW REVIEW

Ninth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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NINTH EDITION

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This article was first published in March 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-17-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALRUD LAW FIRM

ARIAS, FÁBREGA & FÁBREGA

ATHERSTONE & COOK LEGAL PRACTITIONERS

BAYKANIDEA LAW OFFICES

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CONTENTS

PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this ninth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past eight years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2017 in nations across the globe, and this is the topic of the second general interest chapter. In 2017, many countries in Asia and Europe, as well as South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring-your-own-device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy.

Bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

In 2015, we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2017, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this ninth edition of *The Employment Law Review* includes 46 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all of our contributors and my associate, Marissa Mastroianni, for her invaluable efforts to bring this edition to fruition.

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Erika Collins is a partner in the labour and employment law department and co-head of the international labour and employment law group of Proskauer Rose, resident in the New York office. Ms Collins advises and counsels multinational public and private companies on a wide range of cross-border employment and human resources matters throughout the Americas, Europe, Africa and Asia.

Ms Collins represents US and non-US employers in all aspects of company growth and restructuring, from office openings, executive hires and workforce expansions to company downsizing, employment terminations, mass lay-offs and office closures. She advises clients on preparing competitive employment packages and agreements, such as separation, expatriate and consulting agreements, that are compliant with local laws, as well as on payroll, benefits and vacation issues. Ms Collins regularly conducts multi-country audits of employment laws and practices in order to provide advice to clients regarding compliance with data privacy, fixed term contracts, outsourcing, and working time and leave regulations among numerous other issues.

Additionally, Ms Collins advises employers on sexual harassment and other misconduct allegations, as well as cross-border investigations. She also is experienced in conducting due

diligence on international subsidiaries and advising on applicable business transfer laws and employee transition issues in cross-border M&A transactions.

Ms Collins is the editor of *The Employment Law Review*, which covers employment laws in 46 countries. In addition to authoring numerous articles on international employment topics, Ms Collins is a regular speaker at the International Bar Association and the American Bar Association. Topics on which she has written and spoken recently include: cross-border transfers of executives; global mobility issues for multinationals; employment issues in cross-border M&A transactions; the landscape of issues in international employment law; global diversity programmes; the intersection of EU privacy and anti-discrimination laws; and cross-border investigations.

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Chapter 28

MEXICO

Rafael Vallejo[1]

I INTRODUCTION

i Legal framework

Employment relations in Mexico are governed primarily by the Mexican Constitution, where the guidelines for employment in Mexico are established. The Constitution was enacted in 1917 and has subsequently gone through several amendments. 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 the employment relationship by setting forth minimum standard benefits and conditions that are required to be observed by employers and that cannot be waived by employees. Article 123 of the Constitution governs everything related to employment relations in Mexico, and is divided into two main sections: Section A, for private employment relations (between individuals and entities and their employees); and Section B, for relations between government agencies and their employees. In 2011, there was an amendment to Article 1 of the Mexican Constitution regarding human rights, as a result of which the principle of *pro persona* was adopted in all Mexican laws, resulting in a broader interpretation that takes into consideration the greatest benefit for the employee, over any provision under a Mexican law that sets forth a right or obligation for any given person.

The Federal Labour Law (FLL) is the statute that governs in more detail everything related to individual and collective employment relations within the whole territory of Mexico: from types of contracts, statutory benefits and compensation, safety, health and training regulations to labour claims, strikes and all types of labour and employment proceedings (judicial and administrative). The FLL follows the same path of Article 123 of the Constitution in terms of setting the minimum standard benefits and employment conditions in any employment relationship, in addition to the rules for labour proceedings before the labour boards and before administrative labour authorities (as a result of a reform to Articles 107 and 123 of the Constitution in labour matters, the labour boards will cease to exist and will be replaced by labour courts, which will be dependent on the judicial system in Mexico).

Both the Constitution and the FLL divide labour matters into two different jurisdictions – federal and local – depending on the industry and activities in which the employer is engaged. The federal government, through its administrative conflict resolution

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bodies (federal conciliation and arbitration boards) and through its administrative labour authority (Ministry of Labour and Social Welfare), is in charge of resolving controversies that are related 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, as well as 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 mechanic or electric auto 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 the manufacture in sawmills or of plywood;
t glass industry, exclusively the manufacture of flat, plain and cut glass, glass containers;
u tobacco industry, covering the benefit or manufacture of tobacco products; and
v banking.

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

In addition, the Social Security Law governs the social security, nursery, medical and retirement mandatory benefits granted by the social security system to all employees. Employers are obliged to register themselves and their personnel with the Social Security Institute, and both parties are obliged to make the applicable social security contributions for employees' protection (employees' contributions are withheld from their paycheck and distributed by the employer to the Social Security Institute). The Law also outlines the entitlements of registered employees and employers to the social security system, particularly with regard to the mandatory regime, which covers five different branches of insurance in favour of employees: (1) occupational risk; (2) health and maternity; (3) disability and life; (4) retirement pensions; and (5) day care.

The Law for the National Fund for Housing of the Employees, the Law of the Institute of the National Fund for Worker's Expenditures and the Law for the Retirement Savings System are other pieces of legislation governing different and more specific aspects of employment relations in Mexico, such as the administration of the loans granted to employees for their

expenditures in goods and services, the administration of loans granted to employees for the acquisition, remodelling or extension of their house in compliance with what the FLL and the administration of the funds constituted by the contributions made by both employers and employees to the retirement system for employees to have decent means of living during retirement and to the Fund for Housing of the Employees Institute.

ii Judicial and administrative authorities

The authorities in charge of solving any employment-related conflicts are the labour boards, however, according to the reform of Articles 107 and 123 of the Constitution and the consequent reforms to the corresponding legislation, including the FLL, the labour boards will cease to exist and will be replaced by labour courts, which will be dependent on the judicial system (see Section II). Currently, there are both federal and local labour boards, depending on the industry branch, covering the activities of the companies involved in such trials. These boards are tripartite, being composed of one representative of the employers, one representative of the employees and one representative of the government, in search of the balance required for every employment relation as mentioned above, 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 shall be resolved by 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

Throughout its history, the labour legislation has undergone two major amendments and some other minor reforms. As a result of the amendments to the FLL, the trends in labour and employment law have resulted in new manners of handling and managing employment and industrial relations 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.

One of the major amendments to the labour legislation occurred on 13 October 2016, when the initiative to reform Articles 107 and 123 of the Constitution was approved by the Senate. The initiative was a result of the 'Dialogues for Daily Justice' carried out by the Economic Research and Teaching Centre, which consulted with academics and lawyers to elaborate a set of proposals on this matter. The main aspects of the constitutional reform are:[2]

a The creation of labour courts to replace the boards of conciliation and arbitration, delegating the administration of labour justice to federal and local court systems, thereby making the switch from the executive branch to the judicial branch.

2 The only information circulating among labour lawyers and the people reviewing the reform relates to the main aspects of the reform – it is not the definitive information on the reform, which is expected to be published in February 2018.

b The creation of 'conciliation centres' in federal and local jurisdictions, which entails a mandatory stage of the judicial procedure for employers and employees that occurs before the formal initiation of the labour conflict.

c The collective bargaining agreements (CBAs), internal labour regulations and the procedures for their execution, filing, registration, conciliation and litigation will be concentrated in a newly created governmental decentralised body, which will depend on the executive branch and will be in charge of the above-mentioned collective matters, as well as the conciliation centres.

d Regarding outsourcing arrangements, it is expected that the sanction of considering the beneficiary of the services as the employer of the employees providing the services will be eliminated, returning to the formula that the beneficiary will only be considered jointly liable in case of non-compliance by the third-party company service provider.

e For requesting the execution of a CBA along with a call to strike, the union must evidence that it represents and has affiliated at least 30 per cent of the employees working at the company in union-type positions (e.g., blue-collar workers), as well as to have those employees request or approve the call to strike.

Some interesting new interpretations and concepts have recently come to light. The following is a summary of the hot topics this year regarding Mexican labour and employment law.

i International Labour Organization Convention 98

The Mexican government has not yet ratified the International Labour Organization (ILO) Convention 98; however, the Ministry of Labour and Social Welfare has officially communicated in the past that the government intends to ratify the Convention as it relates to collective labour rights. This will be a positive development for unions and workers' representation, taking into consideration that the Convention is fundamental in terms of unions' collective bargaining rights and will be in line with the new reforms to the labour laws regarding collective bargaining and representation of workers.

The main goal is to avoid concentrating solely on workers' best interests and to encourage both parties in the labour relationship to reach an agreement in line with the basic principle of labour peace, as well as preventing or eliminating 'white' or 'ghost' unions.

ii Outsourcing as a vulnerable activity

The Financial Intelligence Unit (UIF) of the Ministry of Treasury and Public Credit declared the outsourcing regime to be a vulnerable activity under the money laundering regulations, because the services being rendered to benefit a company are carried out without any labour relationship between the employees and the benefited company; therefore, it qualifies as a vulnerable activity through which money laundering can be carried out.

Moreover, the Fifth Collegiate Tribunal in Administrative Matters of the Third Circuit issued criteria stating that outsourcing arrangements that do not comply with the applicable labour and employment provisions for being held lawful and valid shall not be subject to value added tax (VAT), because any non-compliant outsourcing arrangement would not be considered an independent services activity, but rather a pass-through of salaries from the contracting party to the employees of the outsourcing [company], bearing in mind that the simple payment of salaries, whether directly or through a third party, does not generate VAT. In this regard, the VAT Law provides that services that are rendered in a subordinate manner through payment of remuneration will not be considered independent services.

In this regard, the interpretation of the above-mentioned Tribunal was that an employee who is employed under an outsourcing arrangement or hired through an outsourcing company that does not comply with the relevant outsourcing provisions set forth in the FLL is, therefore, performing a subordinate role through the payment of a remuneration or salary that is covered by means of a third party. Therefore, expenditures made through the services agreement of the outsourcing scheme are not subject to VAT. This criteria is relevant because it has already resulted in amendments to the VAT Law and Federal Income Tax Law, which means that VAT paid to the outsourcing agencies by their clients will not be credited by the tax authorities and, therefore, will not be reimbursed, balanced or credited against other VAT accumulated by the contracting party. In addition, income tax will not be deducted from the payments made to the outsourcing agencies by their clients, in case the outsourcing arrangement between companies does not meet the statutory requirements.

III SIGNIFICANT CASES

i Criteria regarding validity of termination agreements

In January 2017, the Supreme Court of Justice issued criteria stating that if an employer and an employee agree to terminate the employment relationship between them through a termination agreement, they are not obliged to execute and ratify the termination agreement before the labour board for it to be valid and in force. However, it is still a recommended practice to ratify the termination agreement by the relevant labour board owing to the fact that, in doing so, a legal security is provided for the employer and the employee as their agreement to terminate the employment relationship will be executed according to the provisions set forth under the FLL.

ii Criteria regarding burden of proof to accredit work shift and overtime for trust or executive employees

In March 2017, the Supreme Court of Justice issued criteria stating that, if during a labour trial a controversy arises regarding the work shift and overtime of an employee in an executive or managerial role, the burden of proof to accredit the work shift and the overtime will now be on the employee. This criteria is based on the fact that this type of employee self-administers their own work shift without any supervision.

IV BASICS OF ENTERING 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 five different types of contracts – two of which are recent additions – for hiring personnel. The standard contracts are entered

into for an indefinite term, 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 validly enter into these agreements, employers must justify their 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 maturity in case of fixed-term employment or at the completion of the undertaking in case of employment for a specific task. If the work or activities under 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.

The two new types of contract added to the FLL and the trial period provided for in the amendment are as follows:

a Seasonal contract: this contract allows employers to hire personnel when the workload increases during a certain time of the year (e.g., Christmas or the summer season).

b Initial training contract: this contract allows employers to train their employees for a three-month period (six months for high-level executives) and if, at the end of said training period, the employer considers that employees subject to training do not meet the requirements set forth for the job, the contract terminates 'naturally' without any liability for the employer other than that of paying the corresponding salaries and benefits accrued during the trial period. In this regard, at the end of the training period the employer has to verify that the employee did not meet the requirements for a permanent engagement and that it heard the recommendation of the joint committee of the company.

c Trial period: this addition to temporary and permanent contracts of employment allows companies to assess their new personnel for a 30-day period (180 for employees in high-level positions (e.g., executive, managerial, supervisory) and for employees with a bachelor's or technical degree), which cannot be extended. If at the end of the contract's term the company determines that the employee does not have the abilities or skills required to perform the job, the contract may be terminated without any liability on the employer, except to pay the corresponding benefits accrued during the trial period. In this regard employers must include objective elements in the contract in order 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 for one period only. Once the term of the trial or training period has ended, the contract and the employment relationship would be terminated accordingly, unless the employer deems that the employee meets the requirements for the position, in which case the employment relationship may be extended and considered as indefinite as a matter of law.

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

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

b whether the employment relation is for a specific task, for a fixed term, seasonal, for initial training or for an indefinite term and whether such contracts are 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 rendered;
e the duration of the work shift;
f the form and amount of the salary;
g the day and place for salary payment;
h indication that the employee will be trained in terms of the plans and programmes established by the company, pursuant to provisions of the FLL; and
i any other term and work condition, such as days of rest, vacation days and any additional agreement reached between employee and employer.

In addition, although they are not mandatory, it is also advisable to detail any benefit paid to the employees as part of their compensation package, a work-for-hire provision and 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 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 the terms contained in it, 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 in it or if benefits above the minimum required by the FLL are first liquidated with the authorisation of the employee through the payment of the corresponding severance.

ii 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 related 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 ID 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. On the other hand, 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 ID 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 provisions provided by Article 15A of the FLL as well as to negotiate the outsourcing agreements in terms such 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.

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

Vacation days are granted according to employees' seniority: for the first year of service, employees are entitled to a minimum of six vacation days; for the second year of service, they are entitled to eight vacation 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 vacation days are added every five years. In addition to this, employees are entitled to 25 per cent of the salary earned during their vacation days, at least, as a vacation premium.

Employees are also entitled to a Christmas bonus equivalent to at least 15 days' salary, which has to be paid before 20 December of each year. The purpose of this bonus is to cover all expenses required for all the year-end festivities.

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

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 not generally enforceable in Mexico, as the authorities cannot restrict individuals from the exercise of the aforementioned right. However, if such clauses and

agreements are executed or established to be in force for the duration of the employment relationship with the employees, 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 such 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 have a deterrent effect on employees for not competing or soliciting against their former employers; however, such clauses could also be held null and void if related directly to the employment or if submitted to and resolved by a labour board (soon-to-be labour court) 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 the former employee not to engage in competitive activities during the agreed period.

VI WAGES

i Working time

The FLL states that for every six working days, employees shall be entitled to one day of rest. In terms of hours, there are three different work shifts, as follows:

a eight hours a day for daytime work (48 hours a week);
b seven hours for night 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 to rest or to have their meals during their shift, and this time shall be considered as part of their work shift. It shall also be considered as part of the employees' work shift if they are not allowed to leave the workplace during this time. However, in connection with this specific topic there is new case law stating that the rest or meal period shall be 60 minutes at least ,and not considered as part of the continuous work shift. This is relevant for employers given that many of them would have to modify the work shift according to this new criteria or run the risk of operating work shifts that surpass the limits established by law, since a 30-minute extension per day would now be considered work time.

Even though the statutory daily work shift sets out a maximum of eight working hours for the daytime work shift, 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, which is why employees would be able to work for more than eight hours per day as long as their weekly work shift does not exceed the statutory maximum of 48 hours.

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

The FLL foresees seven working hours for those 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 shall be deemed as overtime.

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

a daytime shift, which is between 6am and 8pm;

b night shift, which is between 8pm and 6am the next day; and

c mixed work shift, which covers periods of both day and night shifts, as long as the night-time period is less than three-and-a-half hours long. If an employee working a mixed work shift works more than these three-and-a-half hours of night work, the work shift shall be deemed as a night shift and subject to the statutory maximum of 42 working hours a week.

ii Overtime

Pursuant to the FLL, all employees are entitled to overtime pay if they have worked for more than the statutory hours for the work shift for which they were hired. It also provides that an employee may not work more than three extra hours daily for no more than three days per week, a total of nine legal extra hours per week. These nine hours of legal overtime shall be paid by the employer with a double salary, and any extra time worked in excess of nine hours during one week shall be paid with a 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.

It is important to bear in mind that, 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 worked in view of the activities they perform. Nevertheless, this should not be understood to mean they are not entitled to overtime pay, because they do have the possibility under the FLL to claim overtime pay with the labour boards. On the other hand, material or manufacture workers are used to receiving overtime pay whenever they work it, appealing to the maximum overtime allowed by the FLL and the corresponding salary to the extra hours worked.

Overtime compensation is paid along with the salary and any other benefit to which the employee is entitled for a certain period of time. Employers have to be vigilant about paying overtime in a timely manner; otherwise employees are entitled to claim for their pay before the labour boards with jurisdiction over the workplace.

VII FOREIGN WORKERS

Pursuant to the FLL, a company should employ at least 90 per cent Mexican workers, but is allowed to fill the remaining 10 per cent of the companies' positions with foreign workers. Technical and professional workers must be Mexican, except in those cases where the activities to be performed are so specialised that there are no Mexican workers available with the required skills. Nonetheless, this does not apply to directors and general managers. Another exception to the above rule is that physicians, railway employees and employees on any Mexican vessel must be Mexican nationals, and civil aviation crews must also meet the same requirement.

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. On the other hand, foreign employees would have to file their tax returns according to the applicable laws.

For a foreigner to work in Mexico, the corresponding working visa must be obtained from the National Immigration Institute and for such purposes the employer shall be registered as an employer with the Institute.

Pursuant to the FLL, foreign nationals shall earn the same salary and benefits as Mexican nationals who perform the same activities. 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 committee 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 along with the disciplinary measures, which cannot exceed those foreseen in such statute. A reference to compliance with the regulations shall be included in the employment contracts 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, intranet or posting them in a visible spot in the workplace or by handing 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 the internal work regulations incorporate, by reference, the global policies as part of the regulations and guidelines that must be observed by the employees, in order for the company to vest such policies with enforceability effects.

IX 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 written 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 documents written in a foreign language with its translation to Spanish when submitting a document in a labour process. If the party that submitted the document in trial does not accompany it with its corresponding translation, the labour board may reject the admission of said document.

X 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 several issues at work, such as training, health and safety, drafting the 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 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 the CBAs and to comply with their terms, is the right to call for a strike and to stop activities until their demands are resolved.

XI DATA PROTECTION

i Requirements for registration

On 5 July 2010, the federal government published in the Federal Official Gazette the Federal Law for Personal Data Protection Possessed by Private Persons (DPL), which has been in force since 6 July 2010 and is intended to protect personal data held by private persons – either companies or individuals – in order to regulate the lawful, informed and controlled treatment of said data, with the objective of ensuring the right to privacy as well as the right of informational self-determination of persons. The DPL protects personal data that is subject to process, use or transfer, at a national and international level.

To clarify the content of the DPL, on 21 December 2011, the Ministry of the Economy published in the Federal Official Gazette the Regulations of the DPL (the Regulations), which have been mandatory since 22 December 2011. The Regulations provide in detail the conditions for the compliance and enforcement of the DPL to bring legal certainty to its regulated subjects.

Both regulatory instruments have a direct impact for employees, either as a means of strengthening their right to privacy in relation to their employer and its subcontractors or to establish duties that employees must comply with in order to preserve the privacy of the personal data that it processes in the course of their activities.

In terms of the DPL and its Regulations, there is no obligation to register the company – in its role of data controller – with the Mexican data protection agency (the National Institute of Transparency, Access to Information and Protection of Personal Data (INAI)) or any other government body. However, diverse obligations should be fulfilled in order to comply with the provisions of the DPL and its Regulations.

The Regulations compel the employers to elaborate an inventory of processed personal data to identify its nature – since sensitive, financial or economic personal data requires the written express consent of the data subject to be collected and processed, and should be protected by stronger measures than if it is 'ordinary' personal data. Besides, the inventory may allow the forms of the processed data to be determined (i.e., whether it is expressed or contained in digital means, in printed forms, or in visual or sound mechanisms).

For the collection and processing of personal data, the general rule is that the data subject – including the employees – must be informed by means of the privacy notice[3] about the collected data, the purposes of the processing, the data transfers and the means to exercise the right to access, rectification, cancellation and opposition to the data processing, as well as the way to express his or her consent to authorise the data processing and transfers. However, the data subject's consent is not required for the processing of personal data to be lawful 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 an employment position do not fall within this exception as they do not have any legal relationship with the employer, so their consent is required for transferring their personal data to a third party.

The Regulations compel the companies to limit access to personal data only to authorised employees owing to their position or functions. The DPL also provides that companies must implement and maintain administrative, technical and physical security measures to protect personal data against damages, losses, alteration, destruction, use, access or unauthorised use (Article 19 of the DPL and Chapter III of the Regulations).

Under Article 48 of the Regulations, the employer is compelled to implement a range of actions to ensure that their employees comply with the DPL and its Regulations such as:

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

b implementing a training, updating and staff awareness programme on the obligations on personal data protection issues;

c establishing an internal system for supervision and monitoring, verification or external audits to test out the compliance of privacy policies;

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

e providing mechanisms for the enforcement of the privacy policies and programmes, as well as for sanctioning its lack of compliance;

f establishing measures for tracking personal data during its processing;

g establishing procedures to receive and respond to doubts and complaints from the personal data holder;

h having mechanisms for compliance with privacy policies and programmes, as well as sanctions for non-compliance;

i establishing measures for the assurance of personal data, in other words a set of technical and administrative actions that guarantee the responsible party's compliance with the principles and obligations set forth by the DPL and its Regulations; and

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

Privacy regulations should be related to the internal labour regulations in order to enforce sanctions within the company in case of infringement.

3 The Ministry of Economy published in the Federal Official Daily of 17 January 2013 the Privacy Notice Guidelines, which provide the interpreting criteria of diverse elements of the Data Protection Law and its Regulations, such as those related to the processing of personal data, the elements that the privacy notice must include, the forms of the privacy notice and the ways to deliver it.

ii Cross-border data transfers

In terms of the DPL and its Regulations, companies are not compelled to register their data transfers at the INAI or at any other government agency and, as a general rule, data transfers are subject to the consent of the data subjects (generally granted through the privacy notice). However, the DPL provides for a few exceptions in which the employee's consent is not required for the data transfer:

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

b the transfer is to companies under the same corporate control (subsidiaries and affiliates under the common control of the data controller), or to a parent company or an associated company that operates under the same processes and internal policies;

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

d the transfer is necessary for the maintenance or fulfilment of a legal relationship between the company and the employee (Article 37 of the DPL).

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

iii Sensitive data

In terms of the DPL, sensitive data is defined as data that pertains to the data subject's most intimate sphere, or 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 (Article 3, Section VI of the DPL).

Financial and economic data is not included within the category of sensitive data, however, the processing of such data requires the express consent of the data subject, except as provided by law (Article 8, Section IV of the DPL).

The requirement for consent in the case of the collection of sensitive data is more stringent than in the case of non-sensitive data. When sensitive personal data is collected, the privacy notice must address explicitly that it deals with this type of data (Article 16 of the DPL). 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 regulated subject (Article 9 of the DPL).

If infringements to the DPL are committed in the processing of sensitive data, the penalties can be increased to twice the established amounts (Article 64, Section IV of the DPL).

iv Background checks

Under the DPL and its Regulations, background checks, credit checks and criminal records are allowed if the candidate for employment has granted his or her express consent, since such records include sensitive data.

Employers must be aware of processing personal data under the principles of lawfulness, consent, information, loyalty, proportionality, confidentiality and accountability, and must be aware of processing the candidate's or employee's personal data or information on a non-discriminatory basis.

XII DISCONTINUING EMPLOYMENT

i Dismissal

It is not easy to terminate an employment relationship in Mexico owing to the principle of 'employment stability' governing employment relations in the country. This principle shall be understood to mean that no employment relationship can be terminated at an employer's will unless the employee incurs one of the causes for termination foreseen in Article 47 of the FLL.

Regardless of the causes set forth in Article 47 under which an employer may terminate a labour relationship with cause, those employees with more than 20 years of seniority can only be terminated when the causes are particularly serious or when they are recidivists, although the FLL does not provide what can be classed as serious.

There is also cause for termination when it comes to trusted employees,[4] particularly when the employee commits any act that leads to the employer losing confidence or trust in such employee.

When lawfully terminating an employee's contract under a statutory cause, the employer must provide him or her with a written notice stating the causes for termination and the dates in which such causes were carried out, or file it with the corresponding labour boards within five days of the termination date for said authority to deliver it to the employee. In this case, the employer has the burden of proof regarding the causes for termination stated in the corresponding notice.

When terminating an employee's contract with sufficient cause, the employer has to pay only the accrued benefits. If the employer fails to prove the causes for termination or the delivery of said notice 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, consisting of: three months' integrated salary;[5] 20 days' integrated salary for each year of service; a seniority bonus, equal to 12 days' salary for each year of service;[6] and accrued benefits owed to the employee, such as Christmas bonus, vacation days earned and vacation premium.

Since 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 in one of the following ways:

a having the employee address a unilateral communication to the employer advising his or her voluntary separation from the job (i.e., a resignation letter). A signed payment quitclaim with the breakdown of the benefits paid to the employee should also be obtained from the employee upon payment by the employer of the amount agreed; or

b a termination agreement may be executed. Such document could be ratified by the parties with the corresponding labour board, however it is not mandatory.

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

5 Integrated salary comprises any and all entitlements or payments in cash or in kind granted to the employee for the past 12 months.

6 For calculation purposes, in this case salary is capped at two times the general minimum wage in force in the region where the employees render their services.

The second option provides the parties with added legal certainty since the document issued as a result of ratifying the termination agreement with an authority has the effect of an official judgment.

ii Redundancies

Whenever an employer wishes to make an employee redundant it has to follow the same process of dismissal or termination without cause described in subsection i, above. 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. In a redundancy, the common practice is to offer the employee full statutory severance pay in exchange for the execution by the latter of the corresponding termination documents (termination agreement or resignation and quitclaim).

For collective redundancies, based on the principle of 'employment stability' governing all employment relations in Mexico, the FLL foresees such kind of redundancy under the following scenarios:

a *force majeure* or acts of God not attributable to the employer, his or her physical or mental disability producing the necessary, immediate and direct termination of the employment relations;
b unaffordability of the business;
c exhaustion of the subject matter of the extraction industry;
d causes foreseen in Article 38 (mining-related causes); and
e legally declared bankruptcy of the employer, if the authorities or creditors resolve the definitive closure of the company or the definitive reduction of their activities.

Carrying forward any 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 leaving out the 20 days' integrated salary payment per year of work. However, it is important to take into consideration that any collective redundancy can be carried forward outside the special proceeding provided by the FLL, in which case a full severance payment must be paid, including the three month's integrated salary, 20 days' integrated salary per year of work and a seniority premium.

When redundancies are the result of implementation of new production processes involving new automated technologies or installation of new machinery in the workplace, employees are entitled not to three, but to four months' integrated salary plus 20 days' integrated salary for each year of service along with the salaries and benefits accrued.

XIII 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 the business. Such transfer shall take place on a certain date agreed among the parties (employers) and it has been held recently that the transfer of employees shall take place whenever the whole or the main part of the business is also transferred. Such transfer is known in the law 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 employment relations already existing, as well as the terms and conditions attached to them (salaries, benefits, work shift, etc.) cannot be reduced nor changed unilaterally by the new employer. If they are somehow affected, employees are legally entitled to claim with the labour boards the granting or observance of their corresponding salaries, seniority, benefits and conditions or even to rescind the labour relationship with cause and with responsibility on the employer.

Employment substitutions do not require the employee's consent to be effective and do not trigger any severance payments. The law requires employers to deliver a substitution notice to the employees, as well as to the Social Security Institute. When informing the Social Security Institute of the substitution, the National Fund for Workers' Housing is automatically advised of the substitution by the Institute.

The FLL and the Social Security Law provide that the former (substituted) employer is jointly liable with the new employer (substitute) for a period of six months onwards for any obligation existing before the effective date of the substitution.

Finally, it is important to bear in mind that the amendment to 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.

XIV OUTLOOK

There has been considerable progress in labour matters in recent months, specifically relating to new outsourcing and tax regulations and the constitutional reform of labour legislation, and the changes to the labour boards as a consequence of this reform. Historically, Mexico has dealt with an overprotective law, and after the entry into force of the labour law reform of 2012, some flexibility for employers has been introduced. Hot topics in 2018 are likely to be: transparent collective bargaining; freedom of association; union elections and limitation to unions' power over employers; discrimination; minimum salary; and the transition process from the current administration of justice model to the new model as a result of the constitutional reform of labour legislation.

Appendix 1

ABOUT THE AUTHORS

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Rafael Vallejo has been a member of Gonzalez Calvillo's employment practice group since 2009 and became partner on 1 January 2016. He is a lawyer with ample experience in all kinds of labour and employment matters, with a noteworthy business-oriented style. He has acted as counsel to multinational and Mexican corporations in numerous labour restructures, employment terminations of senior management personnel, individual and collective labour negotiations and litigation as well as in labour and employment due diligence procedures and audits of international labour organisations such as the Fair Labour Association.

He holds a master of laws degree from Duke University School of Law at Durham, NC and obtained a JD degree from the Ibero-American University in 2003. He also completed postgraduate studies in labour law at the National Autonomous University of Mexico and in business law at the Free School of Law. Mr Vallejo is member of the steering committee of the International Forum on Employment Law.

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ISBN 978-1-912228-17-1