The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Mexico: Employment & Labour Law (3rd edition)

This country-specific Q&A provides an overview to employment laws and regulations that may occur in Mexico.

This Q&A is part of the global guide to Employment & Labour Law. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/employment-and-labour-law-3rd-edition/

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1. **Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful in your jurisdiction?**

   An employer must have a justified cause to terminate an employment relationship. That cause should be set out in article 47 of the Federal Labour Law (FLL), which describes the justified causes for termination as follows:

   1. The employee deceives the employer, or when applicable, the union that suggested him or recommended him, with false certification or references that attribute

qualifications, aptitudes, or abilities to the employee that he lacks. This reason for termination will elapse after the employee has rendered services for thirty days;

2. The employee in performance of his job is not honest or honorable, commits violent acts, threatens, commits injuries on the employer, his family, the management or administrators of the company or establishment, or against clients or suppliers of the employer, except when provoked or in self-defense;

3. The employee commits against one of his co-employees one of the acts detailed in the previous clause, if as a consequence the discipline and order of the workplace is affected;

4. The employee commits, outside the workplace, against the employer, his family or the management or administration, any of the acts referred to in clause 2, if they are so serious that it makes the continuance of the employment relationship impossible;

5. The employee intentionally causes material damage during the discharging of his duties to the buildings, machinery, instruments, raw materials, or any other assets related to the job;

6. The employee negligently causes the damages mentioned in Section 5 provided that they are serious, and that negligence is the sole cause of the damage;

7. The employee compromises, by his imprudence or inexcusable carelessness, the safety of the establishment or the people that are present inside it;

8. The employee commits immoral acts, harassment or sexual harassment in the establishment or place of work;

9. The employee reveals industrial secrets or makes known private personal matters, the disclosure of which damages the business;

10. The employee has more than three absences in a period of thirty days without

permission of the employer or a justifiable excuse;

11. The employee disobeys the employer, without justified cause, in the course or scope of the contracted work.

12. The employee refuses to adopt preventive measures or to follow the procedures established for avoiding accidents and illnesses;

13. The employee arrives at work intoxicated or under the influence of some narcotic or intoxicating drug, except in the latter case, where there is an existing doctor's prescription. Before beginning his service, the employee must bring this to the attention of the employer and present the prescription from the doctor;

14. Any implemented sentence that imposes prison time on the employee that prevents him from completing his employment relationship;

14Bis. Lack of documents required by laws and regulations necessary for the provision of services, when the responsibility of the worker, and in excess of the period specified in Section IV of Article 43.

15. Those issues similar to those established in the previous sections that would have serious consequences.

For administrative or salaried employees, there is a special cause for termination, referred to in article 185, when there is a sufficient and reasonable motive of loss of trust in the employee's work.

Employees engaged in sales can be terminated with cause, if there is an unjustified, important and constant reduction in sales.

In order to lawfully terminate an employment relationship with just cause, the employer must inform the employee in writing of the date and cause or causes of the termination. This document must be brought to the attention of the employee, or

directly to a Labour Board, within five days of the termination, providing the Labour Board with the address the employer has on file and requesting they notify the employee.

The lack of a written notification to the employee or the Labour Board will alone be enough to consider the separation unjustified, and consequently, nullify the dismissal.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?

The FLL dedicates a full chapter to this matter (Title 7, Chapter 8). The only reasons for which an employer can dismiss a large number of employees together (collective terminations) are described on article 434 of the FLL, as follows:

1. Force majeure or any unforeseeable event not imputable to the employer, or the employer's physical or mental incapacity or death, the necessary, immediate and direct consequence of which is the end of work;

2. The known and obvious failure of the business to cover costs;

3. Exhaustion of the subject matter of an extractive industry;

4. The cases referred to in article 38. The employment relationships for mining and mineral extractions that exhaust the minerals or for the restoration of abandoned or paralyzed mines, can be employed for a determined time or project or for the investment of a determined capital; and

5. Insolvency proceedings instituted by creditors or in a lawfully declared bankruptcy.

For a large number of dismissals or a shutdown, the employees are entitled to a full severance payment equal to that of an employee terminated without a justified cause, except in the case of introduction of machinery and equipment, in which case the

employees will be entitled to 4 months of integrated salary.

Pursuant to article 437 of the FLL, to dismiss a large number of employees in a lawful manner, the number of jobs in a business or establishment and the lists ranking workers on the basis of qualifications, job category and seniority, shall be taken into account so that workers with the least seniority are the ones first affected.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

There is no employment termination on business sales. If there is a purchase of shares or stock, then it does not trigger a termination (unless established otherwise in the employee's individual employment agreement, which is not very common for regular employees, though sometimes it is established for officers). If the purchase is of assets, then an employer substitution is triggered.

The employer substitution will not affect employment relationships. The substituted employer will be jointly liable with the new employer for the obligations under the employment agreements and the law that were made before the substitution for six months, after which the new employer will be solely responsible.

The term of six months referred to in the last paragraph will begin on the date of the announcement of the employer substitution to the union and the employees.

4. What, if any, is the minimum notice period to terminate employment?

Under Mexican legislation there is no minimum notice period to terminate an employment relationship. That is, when the employer dismisses the employee the employment termination will be effective immediately. When an employer terminates an employee under the justified causes established in article 47 of the FLL, the

employer must notify the employee within 30 days of the cause or causes of the termination, or notify the Labour Board, within five days following the termination.

5. **Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?**

   Given that there is no need to provide prior notice, it is not common in Mexico to offer additional compensation.

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to say at home and not participate in any work?**

   It is not a common practice in Mexico, since the employer can terminate the employment relationship immediately.

7. **Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.**

   Yes, as mentioned above, under Mexican legislation the termination of employment relationships must follow specific procedures.

   When the employer has a justified cause for the termination, pursuant to the aforementioned article 47 of the FLL, the employer must inform the employee in writing of the date and cause or causes of the termination, this must be done within 30 days of the justified cause. This document must be brought to the attention of the employee, or directly to the Labour Board within five days of the termination, providing

the Labour Board with the address the employer has on file, and requesting the Authority to notify the employee.

The lack of a written notification to the employee or the Labour Board will alone be enough to consider the separation unjustified, and consequently, the nullity of the dismissal.

If the employer does not have a cause for termination, but still would like to terminate the employment relationship by mutual consent with the employee, then we commonly suggest following one of these two procedures:

a. By executing a Termination Agreement before the Conciliation and Arbitration Labour Board, sanctioned and ratified by such Board with respect to its content, signing, delivery and receipt of the amount by the employee, as well as the signing of a settlement (finiquito) that breaks down the elements of the amount referred to in the Agreement and being paid. The advantage of this scenario is that the Termination Agreement is a public document, unassailable with respect to its authenticity in the case of a labour claim, and much more defensible evidence than a resignation letter.

b. By a signed and fingerprinted resignation letter having the following characteristics:

b.1. ADVANTAGES: No intervention by the officers of the Board required; the termination process is more agile.

b.2 DISADVANTAGES: It is a private document that, although valid, may be objected to by an employee deciding to file a labour claim and disavowing his signature and fingerprint, or alleging that he was forced or misled to sign said document.

Although a resignation letter is a unilateral and voluntary way to terminate the employment relationship, it is a common practice in Mexico to ask an employee to sign one when dismissed. The reasons behind this is that (i) there is no employment at will; and (ii) the burden of proof in litigation lies on the employer at all times, including the cause of termination or dismissal. That lack of flexibility make employers opt for a more agile way to terminate employees.

8. **If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?**

The lack of a written notification to the employee or the Labour Board will alone be enough to consider the separation unjustified, and consequently nullify the dismissal. The employee will be entitled to full severance payment consisting of:

a. Payment of proportional parts of those labour benefits accrued on the date of the termination (i.e., Christmas bonus, vacation, vacation premium);

b. Payment of an amount equivalent to 12 days per year of rendered services, capped at twice the daily minimum wage ($80.04 pesos) for the geographic area, as seniority premium;

c. Payment of an amount equal to 3 months' salary, paid with consolidated salary (consolidated salary is the base salary plus the proportional part of the accrued benefits) as Constitutional Severance;

d. Payment of an amount equivalent to 20 days of consolidated salary per full year of rendered services (if the employee requested reinstatement); and

e. Payment of back wages from the moment of the termination to the date on which the employer pays the awarded amounts.

9. **How, if at all, are collective agreements relevant to the termination of employment?**

Collective bargaining agreements are considered to be accords that go beyond the law, when beneficial to the employee. Many collective bargaining agreements contain

clauses dealing with termination severances which are more generous than those established by law. Likewise, many collective bargaining agreements establish special procedures to sanction or even terminate employees, requesting the intervention and opinion of the union to go forward with it. In such cases, it complicates any unilateral decision by the company to terminate an employee.

10. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

The FLL provides as a general principle of Mexican labour law, the prohibition of acts of discrimination and labour and sexual harassment. These acts are also considered grounds for terminating an employee with cause if the employee engages in this type of conduct. Finally, in the catalogue of employer prohibitions, any act of discrimination or labour or sexual harassment is expressly forbidden.

In the event of an act of discrimination or labour or sexual harassment, an employee can bring an action against the employer, terminating the employment relationship with cause, and claiming the payment of severance plus accrued back pay through the end of the trial. There is no special severance, compensation or damages available in Mexican labour court for an employee claiming an act of discrimination or labour or sexual harassment. Because the employee would have to terminate the employment relationship with the employer with cause based on said grounds, the severance available is the same as for any other action for wrongful termination or unjustified dismissal.

11. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

As mentioned above, because there is no special remedy or damages available to an employee who suffered discrimination or harassment, the consequence would be the

statutory severance under the FLL for wrongful termination or unjustified dismissal. Such severance is a fixed formula comprised of the following elements:

1. Payment of proportional parts of those labour benefits accrued on the date of the termination (i.e., Christmas bonus, vacation, vacation premium);

2. Payment of an amount equivalent to 12 days per year of rendered services, capped at twice the daily minimum wage ($88.36 Mexican pesos) for the geographic area, as seniority premium;

3. Payment of an amount equal to 3 months' salary, paid with consolidated salary (consolidated salary is the base salary plus the proportional part of the accrued benefits) as Constitutional Severance; and

4. Payment of an amount equivalent to 20 days of consolidated salary per full year of rendered services (if the employee requested reinstatement). Another possible consequence is that an employee may file a claim before the Labour Ministry, which would order an inspection visit to the employer work site. If the inspector is able to find evidence supporting an act of discrimination or harassment, the employer may be liable for a fine between 250 and 5000 times the Measure and Update Unit ("UMA" by its name in Spanish). The UMA is currently MXP 80.60.

In theory, there is a possibility for an employee seeking redress for acts of discrimination or harassment before a civil court. The individual, based on the Civil Code of the state where the conduct took place, may ask for damages (including reputational damages), having to show the relation between the wrongful conduct and the suffering it caused, and being able to quantify the amount of alleged damages. In practice, this action as rarely pursued in Mexico.

12. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context

of termination of employment?

N/A

13. **Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?**

While there may be special protections for certain types of employees such as minors 15 to 18 years old and pregnant employees, every employee is entitled to the same protection on the termination of employment. Employees with a tenure of more than 20 years of service are partially protected against termination with cause, in the sense that the grounds for termination must be, according to the FLL, “particularly serious”.

14. **Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?**

N/A

15. **What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?**

Statutory severance in the FLL for wrongful termination or unjustified dismissal is a fixed formula comprising the following elements:

a. 3 months of consolidated salary (base salary plus benefits in kind and in cash);

b. 20 days of consolidated salary per year of services rendered;

c. 12 days of salary per year of services, capped to two times the minimum wage (currently 88.36 Mexican pesos); and

d. Pro-rata part of employment benefits up to the effective date of termination.

If an employee voluntarily resigns from his/her job, he/she will only be entitled to the pro-rata part of employment benefits, up to the last day of employment. If the employer terminates the employee with cause, the latter will be entitled to the following:

a. 12 days of salary per year of services, capped to two times the minimum wage (currently 88.36 Mexican pesos); and

b. Pro-rata part of employment benefits up to the effective date of termination.

Finally, if an employee dies, following the procedure established in the FLL to designate his/her economic dependants, the employer is obligated to pay to the latter the following:

a. 12 days of salary per year of services, capped at two times the minimum wage (currently 88.36 Mexican pesos); and

b. Pro-rata employment benefits up to the effective date of termination.

16. **Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.**

N/A

17. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

The Mexican Constitution includes the general principle of “freedom of work”, whereby an individual cannot be prevented from working or performing a lawful activity, unless there is a judgment stating otherwise issued by a competent court.

Based on the above, the general accepted interpretation is that non-compete obligations and in general restrictive covenants are not enforceable in Mexico. This interpretation would not vary, even if the obligation is limited to a certain period, territory, product or to identified competitors.

In practice, some companies in Mexico have entered into non-compete agreements, following the termination of employment with the employee, agreeing on a compensation for not engaging with a competitor. Although not completely effective, the agreement may be an incentive for the former employee to comply with the same while receiving the agreed compensation. In the event of a violation of the agreement, the company will be entitled to stop paying the agreed compensation and try to recover the compensation already paid, which normally is difficult.

18. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

The FLL provides that any waiver of employee’s rights is null. However, it is relatively common to find negotiations when terminating an employee, where the parties agree on an amount below the amount resulting from the mandatory severance. While an employee’s statement waiving his/her right to severance would be unenforceable, in

practice, the parties will enter into a mutual agreement to terminate the employment, agreeing on a lump-sum amount that is not referred to as severance, but as an “extraordinary compensation” or “gratification”. Normally, the aforementioned concept is a portion of what would otherwise be full severance under the FLL.

The agreement reached between employer and employee, in order to be binding, must be personally ratified before the Conciliation and Arbitration Labour Board.

Yes, it is possible and legal to enter into a confidentiality agreement with an employee after termination of employment. The violation of this type of agreement may give rise to a claim for damages against the former employee or even a criminal action. It is important to establish in detail the information that will be considered confidential, as not everything may be regarded as confidential under Mexican law.

19. **Are employers obliged to provide references to new employers if these are requested?**

No, there is no obligation to provide references to subsequent employers, even if requested by the potential new employers. However, in terms of the FLL, an employee is entitled to obtain from his/her employer a statement of work, showing the date of hire, position, most recent salary earned and last day of employment. It is becoming a common practice in Mexico not to give references to new employers and keep any information strictly to the terms of employment that remain in effect with the former employee.

20. **What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?**

Mexico is a country with laws and courts that are protective of employees’ rights, which means that terminating an employee is always a challenge. Terminating an employee without cause by paying statutory severance is less complicated than

termination someone with cause. However, employees (especially high-ranking employees) may want to negotiate additional compensation with the employer or a more beneficial consolidated salary (as basis of severance).

Termination with cause is the most difficult employer action. Mexican courts are very strict in terms of the process to follow with the employees (i.e., notifying in writing and in person the grounds of termination), as well as the standard of proof in order to demonstrate the grounds of termination. Accordingly, employers need to carefully handle any termination with cause, ideally with the assistance of in-house or outside counsel.

Another difficult situation is an employee that abandons work. The FLL requires in almost every case of termination that the employee is present, either to sign a resignation letter, to receive a termination notice, or sign a severance agreement. The FLL is silent with respect to an employee that stopped showing up to work, and judicial precedents make it difficult to defend termination in cases of abandonment in litigation. It is not without risk, but companies normally will cancel the employee's payroll and, subject to certain circumstances and conditions, cancel the employee's registration before the Mexican Social Security Institute, hoping not be sued in the future.

21. **Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?**

An important Constitutional amendment is awaiting approval by state congresses where, among other changes, the current Conciliation and Arbitration Board will be replaced by courts in the judicial branch. While this is not a change that will directly impact the way employers approach termination of employment in Mexico, we believe that a completely new judicial and adjudication system will shape litigation around alleged wrongful terminations. It is expected that the protective nature of the FLL will continue, but there is a chance that independent courts (as opposed to the current Labour Board of the Ministry of Labour) may have a more balanced vision of the

contending parties at trial.