THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Fourth Edition

Editor
Nicholas Robertson

THE LAWREVIEWS

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FOURTH EDITION

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PREFACE

I was delighted to be invited to be the editor for *The Labour and Employment Disputes Review* for another year. This follows on from my move at the start of the year from Mayer Brown to become part of the 60-person employment team at Keystone Law. A number of my new colleagues have contributed to the UK chapter, primarily Alexandra Carn, Emma Clark, Fiona MacDonald and Rachel Tozer, for which I am very grateful. I would also like to record my thanks to Mayer Brown since they kindly consented to us using the previous version of the UK chapter as our starting point for this year's annual review, to maintain consistency of approach.

It is clear that one story above all others dominates employment law during 2020. The pandemic has changed the way we work and the way we think about work, and has caused employers and employees alike to focus on aspects of the working relationship that have traditionally received relatively little attention. For example, for many employees, health and safety at work was something that operated invisibly, and which employees/workers (rightly or wrongly) took for granted. Clearly this was not the case in all industries but, in precarious jobs in the gig economy, employees had only the lightest touch protection and the very low risk of facing enforcement by the health and safety authorities meant that some businesses did not feel the need to focus extensively on health and safety unless and until something went badly wrong.

That has clearly altered. Health and safety is now top of the agenda for employers and employees alike and will remain there for the foreseeable future. In the UK we have seen a test case extending the ambit of health and safety legislation to workers. The need to provide urgent protection to workers who were compelled, out of economic necessity, to carry on working during the pandemic meant that it was worth a trade union bringing a test case to prove that the UK's legislation in this area was deficient. It is notable that the legislation in question had been on the statute books for many years without being challenged, although the deficiency was well recognised.

Similarly, the European Union's framework directive on health and safety matters protects employees and workers who take steps to avert a serious and imminent danger at work, or who absent themselves from work because of serious and imminent danger. In particular, the employee must not be subjected to any detriment by the employer as a result of taking such action or staying away from work. It is clear that this is going to raise very difficult issues. What is to happen to an employee who is healthy but who considers that the employer's working practices or premises entail an unacceptable risk of catching the virus? What happens if an employee or worker is living with someone who is clinically very vulnerable, but the employee is required to go back to work by the employer? It is relatively clear, in the UK at least, that the right applies to actions by the individual to protect

themselves or to protect 'other persons' from the danger, and there is no need for those 'other persons' to be colleagues.

Looking to 2021, I anticipate that these sorts of issues will start to play out across the courts and tribunals globally. We will also have to grapple with difficult issues relating to vaccinations. Will it be lawful for employers to require employees or workers to have a vaccination? Will employers be entitled to reject applicants for jobs because they have not had a vaccination? If employers do not have a blanket right to require vaccination, are there circumstances in which it would be permissible to require vaccination? Alternatively, if there is going to be a general acceptance that it is open to employers to require vaccination for employees, are there going to be circumstances where employees can refuse, for example on health grounds, or based on religious or philosophical beliefs? These issues are controversial already and are only going to become more controversial as 2021 progresses.

It seems that those advising employers and those advising employees on legal rights would do well to remember the old Chinese curse: 'May you live in interesting times'. 2021 is undoubtedly going to be an 'interesting' year.

Nicholas Robertson
Keystone Law
London
May 2021

Chapter 11

MEXICO

Alfredo Kupfer-Domínguez and Sebastián Rosales-Ortega[1]

I INTRODUCTION

Labour and employment disputes in Mexico are extremely common, as access to justice is guaranteed free of charge by the state. Basically, the legal framework for labour and employment disputes is set out by the Mexican Constitution, the Federal Labour Law, the Social Security Law, and all the applicable jurisprudence and criteria issued by the collegiate circuit courts and the Mexican Supreme Court of Justice.

The federal and local conciliation and arbitration labour boards (the labour boards) are the authorities currently in charge of solving employment disputes, and they are formally part of the executive branch of the government. However, on 23 February 2017, the Constitution was reformed to create labour courts, which will replace the labour boards and will form part of the judicial branch of the government. This, of course, has entailed a major change from how labour processes were handled and resolved in the past, and Mexico is now moving to a new paradigm.

Consequently, as of 1 May 2019, the Federal Labour Law has also been reformed and, in accordance with the transitory articles of the reformed Law, local labour courts will begin activities within three years and federal labour courts within four years (whether a local or a federal labour court hears a private sector matter will depend on the type of activity performed by the employer).

This change has started to be implemented both on the federal and local levels, including:

a local conciliation centres and local labour tribunals began their activities on 18 November 2020 in the states of Campeche, Chiapas, Durango, San Luis Potosi, State of Mexico and Zacatecas; and

b the Federal Centre for Conciliation and Labour Registration and the federal labour tribunals began their activities on 18 November 2020 in the states of Campeche, Chiapas, Durango, Hidalgo, San Luis Potosí, State of Mexico, Tabasco and Zacatecas.

The implementation of the new judicial system will be completed in the rest of the states in two more stages. The stage that is to be completed in October 2021 will consist of Aguascalientes, Baja California, Baja California Sur, Colima, Guanajuato, Guerrero, Hidalgo (local authorities), Michoacan, Morelos, Oaxaca, Puebla, Queretaro, Quintana Roo, Tlaxcala and Veracruz.

1 Alfredo Kupfer-Domínguez is a partner and Sebastián Rosales-Ortega is an associate at Sánchez Devanny.

Finally, the stage that is to be completed in May 2022 will consist of the states of Chihuahua, Coahuila, Jalisco, Mexico City, Michoacan, Nayarit, Nuevo Leon, Sinaloa, Sonora, Tamaulipas and Yucatan.

Once the federal and local tribunals, as well as the Federal Centre for Conciliation and Labour Registration, begin operations, the Conciliation and Arbitration Boards will stop receiving new claims and will only focus on solving those previously filed.

Although the Federal Labour Law reform represents a great change and presents significant challenges, in general, and at its substantive core, the spirit of the Federal Labour Law remains the same in many ways, as it largely favours the employee and places a heavy burden on the employer to provide evidence of employment conditions and the existence of certain documents, among other things. Furthermore, insofar as the law provides procedural protections and benefits for employees that are not granted to the employer (such as options not to attend preliminary hearings and to have lawsuits ratified as filed), conditions are not equal for both parties.

In principle, the practice of labour law should be prompt and expeditious, as guaranteed by the Constitution. However, this principle has not been duly observed by the conciliation and arbitration boards, which have proved slow in exercising their authority, often taking as long as four years to resolve an employment dispute. This has served as an additional motive for putting the judicial branch in charge of labour justice matters, as opposed to the executive branch.

The following sections address the general outline of the ordinary procedures in labour and employment law in Mexico, as well as the most relevant disputes arising within employment relationships, and they also provide a more detailed explanation of the labour law reforms and the factors that triggered them.

II PROCEDURE

Conflicts arising from employment relationships will now be resolved by federal or local labour courts. There is a transition period in which local and federal labour courts shall begin their activities, which is to be completed in May 2022.

Until the labour courts begin functioning, whether on a local or federal level, the labour boards will continue to oversee labour and employment cases through a process of hearings regarding conciliation, demands and exceptions, followed by stages for the offering and admission of evidence and their corresponding discharge. However, the Federal Labour Law reform has created new institutions, introducing the following procedural stages to be undertaken before recourse is made to the new labour courts.

i The Federal Centre for Conciliation and Labour Registration and local conciliation centres

The Federal Centre for Conciliation and Labour Registration will have, among others, the following two main functions: (1) to register all collective bargaining agreements, internal regulations and union organisations, and any of their related administrative functions; and (2) to provide, at a federal level, the conciliation function as a mandatory requirement previous to the filing of a labour claim.

The local conciliation centres will only exercise the pre-trial conciliation function, and will not have responsibility for registering collective bargaining agreements, internal rules or union organisations.

ii Labour dispute procedures

Prior to filing a claim before the labour courts, employees or employers, or both, must start a conciliation procedure (mandatory pre-trial requirement). This procedure will last up to 45 days and will suspend the statute of limitations to file a labour claim. Should the employee and the employer fail to reach an agreement, either the federal conciliation centre or the local conciliation centre will issue a certificate stating that the procedure has been exhausted.

Disputes arising over discrimination, termination of pregnant employees, appointment of beneficiaries, collective bargaining agreement entitlement claims or challenges to union statutes will not require this pretrial procedure.

If the parties enter into litigation, the plaintiff will present the claim and evidence, so that the defendant can produce its answer and furnish evidence. Once that has been done and the parties have exercised their corresponding rights to object, the labour courts will summon the parties to a preliminary hearing at which the case will be 'purged', meaning that the subsequent stages will focus only on those items that are still in contention. The labour court will admit evidence and will schedule a trial hearing, at which all the evidence will be discharged and the parties will be allowed to present allegations.

The reformed Federal Labour Law also considers special procedures for the appointment of beneficiaries of deceased employees; for cases of the disappearance of an employee due to a delinquent act; in relation to social security matters (which constituted around 80 per cent of the total workload of the current labour boards); and in respect of entitlement to collective bargaining agreements.

Another important development is the incorporation of electronic means of legal service for the parties in a dispute.

iii Collective matters

In full compliance with the 98th Convention of the International Labour Organization, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the United States of America, United Mexican States, and Canada Agreement, the Federal Labour Law reform deals with the freedom of association and unionisation (to belong or not to a union), effective negotiation of collective bargaining agreements, and the prohibition on employers inducing employees to support, or not support, a union. In all collective procedures involving voting, the relevant labour authorities must guarantee that employees can cast their votes in a free, personal, secret and direct manner. Before the Federal Labour Law reform, union voting was carried out by raising hands, a practice that was heavily criticised as undemocratic.

Unions that seek the execution of a collective bargaining agreement must obtain a certificate of representation from the Federal Registration Centre showing that they represent at least 30 per cent of the employees subject to the collective bargaining agreement. If any other union requests a certificate of representation in respect of the same constituent body of employees, the employees will have to vote for the union of their choice and the one that obtains the majority vote will obtain the certificate.

The Federal Labour Law reform has also introduced a requirement for unions to hold a vote in which the employees must decide whether to accept any proposed revision of the applicable collective bargaining agreement or the scale of wages. If the majority of the employees do not accept the proposed revision, the union will be entitled to strike or to postpone the strike until reaching an agreement satisfactory to the majority of the employees.

Further, the employer will be obligated to deliver a copy of the collective bargaining agreement to each employee within 15 days of its presentation to the Federal Centre.

For existing collective bargaining agreements, they must undergo a process of legitimisation within four years following the approval of the reform. This means that the contents of the document must be agreed and approved by the majority of the unionised workers, under a free, personal, secret and direct vote. If the collective bargaining agreement is not legitimised or not approved and supported by the majority of the workers, it will be deemed as automatically cancelled.

iv Other relevant matters

Private settlement agreements

Termination agreements between employers and employees that are executed without the intervention of the labour authorities will be valid; however, if a provision contains a waiver of a right, that provision will be null and void, but the rest of the agreement will continue to be valid.

Notice of rescission

The lack of a rescission notice to the employee or to the labour authorities will create the presumption of unfair dismissal. However, the employer may prove at trial that the termination was justified.

Payment of severance by consignment

In cases of a termination of an employee with service of less than one year, where it is impossible to continue the employment relationship under the requisite criteria of the labour authorities, where the employee is an 'employee of trust' (mainly administrative employees), or where the employee is a household or temporary worker, the employer will be able to consign the severance payment at the corresponding labour tribunal, so that the employer can terminate the employment relationship without incurring additional back wages.

III TYPES OF EMPLOYMENT DISPUTES

The Federal Labour Law identifies the categories of labour disputes to be resolved by the newly created labour tribunals. The most relevant of these are listed below, with their most important procedural characteristics.

i Unfair dismissal

The most common disputes in Mexico have their origin in unfair dismissals, as in Mexico the concept of 'employment at will' is not applicable.

Therefore, according to the Federal Labour Law, any employees that are unfairly dismissed are entitled to receive the following:

a payment of all accrued legal and contractual benefits up to the date of termination (such as vacations, vacation premium and year-end bonus);
b severance payment of three months of consolidated salary;
c payment of 20 days of consolidated salary per year of service; and
d payment of 12 days per year of service with the salary capped at twice the daily minimum wage for the area.

An employee wishing to file a lawsuit for unfair dismissal has a period of two months from the date of the dismissal or service of the rescission notice (see Section III.ii) in which to file his or her claim. This type of claim is pursued through standard proceedings before the labour courts.

ii Employment rescission

The Federal Labour Law provides a list of justified causes for termination, which if duly proven, exempt the employer from paying severance. The following are justified causes for termination:

a The employee deceives the employer (or, where applicable, the union that suggested or recommended the employee) with false certification or references that attribute qualifications, aptitudes or abilities to the employee that he or she lacks. This reason for termination will lapse after the employee has rendered 30 days' service.

b The employee in performance of his or her job is not honest or honourable; commits violent acts; threatens or injures the employer, the employer's family, the management or administrators of the company, or damages the establishment (except where the employee has been provoked or acted in self-defence).

c The employee commits one of the acts stated in (b) against a co-employee and, as a consequence, the discipline and order of the workplace is affected.

d The employee commits any of the acts stated in (b) against the employer, the employer's family or the management or administration outside the workplace so seriously that it makes continuance of the employment relationship impossible.

e While discharging his or her duties, the employee intentionally causes material damage to the company buildings, machinery, instruments, raw materials or any other asset related to the job.

f The employee causes the damage stated in (e) not intentionally but negligently, provided that the negligence is the sole cause of the damage and the damage is serious.

g The employee, through imprudence or inexcusable carelessness, compromises the safety of the establishment or the people present inside it.

h The employee commits immoral acts in the establishment or place of work.

i The employee reveals industrial secrets or makes known private personal matters that damage the business.

j The employee has more than three absences in a period of 30 days without the employer's permission or a justifiable excuse.

k The employee disobeys the employer or its representative, without just cause, provided that the disobedience relates to the work for which the employee has been hired.

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

m The employee arrives at work intoxicated or under the influence of some narcotic or intoxicating drug, except where, in the latter case, there exists a doctor's prescription for the medication. Before beginning his or her service, the employee must bring his or her medical condition to the attention of the employer and present the doctor's prescription.

n Any implemented sentence that imposes prison time on the employee and prevents him or her from completing the employment relationship.

o The lack of documentation required by law for the performance of the contracted activity, whenever this documentation is imputable to the employee.

The Federal Labour Law provides that an employer that dismisses an employee for any of the above stated causes must deliver a written notice to the employee with a detailed explanation of the conduct that triggered the termination and the date or dates on which the conduct occurred.

If the employee does not agree with the rescission, he or she may file an action for unfair dismissal within two months of the rescission notice being duly served.

However, the employer is also allowed to dismiss the employee and present the rescission notice to the corresponding labour tribunal, so that the authority then serves the employee with the causes for termination. In addition, if, prior to any claim being served, an employer demonstrates to the labour tribunal that it terminated an employee with just cause, it does not have to comply with the formality of a written notice to the employee.

iii Payment of accrued benefits:

As employees are not legally obliged to give prior notice when terminating their employment voluntarily, in many cases they are not paid their accrued benefits immediately. Therefore, employees may claim their accrued benefits within one year of termination. In general, accrued benefits consist in their year-end bonus, vacations and vacation premium, as well as any other contractual benefit owed to them.

If the amounts at issue exceed the equivalent of three month's salary, the dispute is governed by the rules of the ordinary process detailed above. If the amounts are not greater than three month's salary, they are claimed by means of a special expedited procedure.

iv Beneficiary designation

According to the Federal Labour Law, employment contracts should contain a specific section for employees to designate the beneficiaries of their accrued benefits in the event of death or disappearance related to a crime. This designation of beneficiaries must follow an established prelation. Nevertheless, an investigation must take place to designate beneficiaries in case there is a dispute between alleged beneficiaries or they have not been properly identified or designated. Again, these matters are dealt with through a special procedure, to guarantee an expedited process.

v Work-related accidents and sickness

Pursuant to the Federal Labour Law, social security in Mexico is mandatory for all employees, regardless of their position or salary level. Therefore, employers and employees are obliged to pay a quota so that all employees are covered by the different insurance branches provided by the Mexican Social Security Institute.

The benefits of this insurance particularly include a severance payment or pension in the event of a work-related accident or sickness, which can be claimed through the special expedited procedure. Typically, these kinds of procedures involve both the employer and the Mexican Social Security Institute, on the basis that the Institute should subrogate to the obligations imposed on the employer, given that the employer has been compliant paying its quotas.

vi Conflicts of an economic nature

Conflicts of an economic nature are those that have the intention of modifying, implementing, suspending or terminating employment conditions or relationships for economic reasons that make it impossible to continue the previous work conditions or employment.

This kind of dispute may be filed by the union, the majority of employees in a workplace or by the employer itself. Labour tribunals must seek a settlement between both parties.

vii Strikes

Pursuant to the Federal Labour Law, strikes are the temporary suspension of activities at a workplace, performed by a coalition of employees. All strikes shall have at least one of the following purposes:

a to achieve a balance between diverse production factors, harmonising employment rights with those of the capital;
b to obtain from the employer a signature on a collective bargaining agreement or to force an agreement's revision;
c to enforce compliance with any of the clauses contained within a collective bargaining agreement;
d to enforce compliance with all profit-sharing related provisions;
e to support a third-party strike that has any of the above purposes (solidarity strike); and
f to enforce the revision of the collective bargaining agreement salary scale.

Strike claims will be resolved by the labour tribunals, ruling on the validity or invalidity of the claim. As in many labour disputes in Mexico, parties are invited to settle the claim, which is a very common result in these types of procedures.

IV YEAR IN REVIEW

On 12 November 2020, President Andres Manuel Lopez Obrador announced and signed a bill to reform several articles of the Federal Labour Law, the Social Security Law, and several tax laws and regulations, with the intention of strictly regulating the provision of specialised services and banning outsourcing and insourcing schemes, which are highly used in Mexico to reduce the impact of profit-sharing. The provision of specialised services will be allowed, as long as it does not involve the subcontracting of employees, and the services are not related to the business or corporate purpose of the company.

Many discussions between business chambers and the federal government have occurred, resulting in the following partial agreements (neither of which are official):

a a transition period for the entry into force of the new regulations so that impacted companies have considerable time to execute the necessary changes to their corporate structure; and
b as the profit-sharing will now be paid directly by the business-operating entity, it is has been suggested that the profit-sharing rate be capped at the equivalent of three months' salary, as opposed to a general 10 per cent pro rata portion of the pre-tax profits.

The discussion and approval of the reform has been delayed several times in the House of Representatives. Nevertheless, it was expected to be conveniently approved and published on 1 May 2021, the date on which Mexico celebrates Labour Day.

In addition to the previous reform, on 11 January 2021, a reform to the Federal Labour Law adding a special chapter on remote work (telework) was published. Although the reform was previously under discussion, it was triggered by the number of people working remotely because of the covid-19 restrictions.

Some of the most relevant aspects of the reform are:

a it will only be considered as telework if the employee performs the activities under this scheme permanently and for over 40 per cent of his or her shift;

b the employer must cover work-related electricity and connectivity costs;

c special conditions must be outlined in the individual employment agreements; and

d parties may establish the mechanisms and timing to return to on-site work.

V OUTLOOK AND CONCLUSIONS

In light of the imminent reform to ban insourcing and outsourcing operations, it is very important that companies using these types of structures define a corporate restructure to be able to directly employ their workforce. Similarly, they must conduct an analysis of their services providers to determine if they are actually specialised or not.

As this is a reform that has been prioritised by leftist President Andrés Manuel López Obrador to prevent the 'abuse' of these structures, it is highly likely that once it is approved, the Labour Secretariat will be very strict in supervising compliance with the new regulations.

Appendix 1

ABOUT THE AUTHORS

ALFREDO KUPFER-DOMÍNGUEZ

Sánchez Devanny

Alfredo Kupfer-Domínguez is co-head of the firm's labour, social security and immigration practice group. He advises local and foreign clients in complex labour and employment matters, including union negotiations, planning for new and existing investments in efficient labour structures, executive transfers and terminations, social security and data privacy matters, formation and implementation of pension plans, equity compensation programmes, and flexible benefit plans. Alfredo also advises clients on labour matters in mergers, acquisitions, restructurings and privatisations, and has developed successful labour relations strategies. He has assisted clients in complex collective litigation, including strikes, work stoppages, union certification and inter-union conflicts. Before joining Sánchez Devanny, he was partner at an international law firm. He is fluent in English and Spanish. Alfredo headed the labour affairs committee of the American Chamber of Commerce in Mexico for over 10 years and is currently the labour counsel of the Chamber. He is the under-director of the National Association of Export Companies and a member of the National Association of Company Lawyers. Alfredo was recently appointed by the Mexican government as a panelist for the Rapid Response Labor Mechanism of the United States–Mexico–Canada Agreement, for disputes between Mexico and Canada. From 2013 to 2018, Alfredo was the manager partner in the firm's Mexico City office.

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Sánchez Devanny

Sebastian Rosales-Ortega joined Sánchez Devanny in 2015 as part of the labour, social security and immigration practice area. Before joining Sanchez Devanny, he worked as a law clerk at a law firm specialising in labour law. He also worked as an associate in the labour practice area in a different law firm, where he dealt with matters in relation to Querétaro's State Commission of Roads, as well as individual and collective disputes for the firm's clients.

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