Costa Rica

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LEGISLATION AND AGENCIES

Primary and secondary legislation

1 | What are the main statutes and regulations relating to employment?

The basic legislation in relation to employment is as follows:

- the Political Constitution of the Republic of Costa Rica of 7 November 1949;
- the Labour Code, Law No. 2 of 27 August 1943;
- the Constitutive Law of the Costa Rican Social Security Fund, Law No. 17 of 22 October 1943;
- the Law on the Payment of Bonuses to Private Company Servers, Law No. 2412 of 23 October 1959;
- the Law against Sexual Harassment in Employment and Teaching, Law No. 7476 of 3 February 1995;
- the Code of Childhood and Adolescence, Law No. 7739 of 6 January 1998;
- the General Migration and Immigration Act, Law No. 8764 of 19 August 2009;
- the Personal Protection Law against the processing of personal data, Law No. 8968 of 7 July 2011;
- the Regulation of the Disability, Old-Age and Death Insurance of the Costa Rican Social Security Fund; and
- the Regulation of the Health Insurance of the Costa Rican Social Security Fund.

Protected employee categories

2 | Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Article 33 of the Political Constitution enshrines in general the principles of equality and non-discrimination. Specifically, article 57 regulates equal pay, and article 68 prohibits discrimination at work.

Initially, the principle of non-discrimination was regulated by Law No. 2694 of 22 November 1960, which prohibits all kinds of discrimination in labour matters and refers to race, colour, sex, age, religion, marital status, opinion and politics, national ancestry, social origin, filiation or economic situation.

Subsequently, with the reform of the Labour Code in 2016, criteria for discrimination were extended in article 404 to include ethnicity, sexual orientation, disability and union membership, as well as an imprecise concept that covers any other analogous forms of discrimination.

Additionally, the country has ratified conventions Nos. 100 and 111 of the International Labour Organization.

Enforcement agencies

3 | What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

According to Law No. 1860 of 21 April 1955, the Organic Law of the Ministry of Labour and Social Security, the main governmental technical body responsible for the effective application of labour legislation is the National Inspection Directorate of the Ministry of Labour.

With regard to social security, the Constitutive Law of the Costa Rican Social Security Fund delegates to the Inspection Department the supervision of the compliance of employers with the payment of their duties.

There is also a special labour jurisdiction composed of work courts, in charge of resolving individual and collective labour disputes and issues related to social security.

WORKER REPRESENTATION

Legal basis

4 | Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Freedom of association is a fundamental right enshrined in article 60 of the Political Constitution, which establishes the possibility that both employers and workers can unionise freely.

In the same way, Costa Rica has ratified agreements Nos. 87, 98 and 135 of the International Labour Organization.

Neither the Constitution nor the Labour Code require the constitution of organisations to represent the interests of workers in the workplace.

The legislation regulates the organisation of unions but does not have specific rules for the creation of other non-union forms of permanent representation. However, in practice, there are permanent workers' committees, which must be elected in a workers' assembly.

Trade unions require a minimum of 12 workers, and permanent workers' committees that are made up of a maximum of three workers must be elected in a meeting in which at least 50 per cent of the company's workers participate (Executive Decree 37184-MTSS of 19 June 2012).

Powers of representatives

5 | What are their powers?

A trade union is the only legitimate body that can negotiate a collective bargaining agreement, whereas both trade unions and permanent workers' committees can negotiate a direct settlement.

The difference between a collective bargaining agreement and a direct settlement is that a collective bargaining agreement must be

subscribed with a trade union that comprises more than a third of the affiliated workers, while a direct settlement can be negotiated in the context of a strike, conciliation or arbitration as means of resolving conflict or, at the initiative of the workers, at any time. However, if a union is formed while a direct settlement is already negotiated or in the course of being negotiated, the priority to negotiate collectively with the employer is granted to the union.

Workers can also exercise the right to strike through the trade union or a coalition of workers. The trade union may request judicial qualification of the legality of the strike before, during or at the end of the strike.

Trade unions can file lawsuits of collective legal interest in the labour courts without the need for the prior express consent of the workers granting them the power to do so. The same does not happen when dealing with collective socio-economic conflicts, in which it needs a specific power for this, granted by its members.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 | Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Article 11 of Law No. 6723 of the Judicial Registry and Archives of 10 March 1982 provides that every person may request that his or her criminal record be certified for labour purposes. Consequently, the employer can ask the worker for the certificate as part of the documents that must be submitted during the recruitment process.

However, when it is for labour purposes, the certificate will only indicate the penalties imposed for crimes processed under the special procedures of organised crime, terrorism, sexual crimes against minors, qualified homicide, feminicide and crimes against the duties of the public function. The certificate will only contain sanctions for sentences served in the previous 10 years. After this, the information will be deleted.

Similarly, if existing penalties against the criminal are found, the Judicial Registry eliminates the sanctions imposed after a certain number of years, depending on the nature of the crime.

The Law on the Protection of Persons Against the Processing of their Personal Data regulates the self-determination of personal information, which is applicable to the employer or to a third party that establishes a database of a personal character that includes the criminal record of the worker.

Medical examinations

7 | Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Article 72(f) of the Labour Code establishes only the obligation that at the request of his or her employer, the worker must submit him or herself to a medical examination to show that he or she does not have any 'permanent disability or any occupational, contagious or incurable disease; or at the request of an official public health or social security organisation'.

Any other medical examination must be justified by objective and reasonable reasons that make its practice indispensable, according to the nature of the position, including for the protection of the health of the person offering his or her services.

It is prohibited for medical examinations to check for HIV, AIDS or pregnancy.

Drug and alcohol testing

8 | Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

During the selection and recruitment of workers, tests can be requested only when they are reasonable in relation to the position and the tasks that the collaborator will carry out.

During the execution of the contract, there are two criteria. For the Ministry of Labour and Social Security, tests can only be requested if there is a reasonable and true suspicion that the worker is working under the influence of alcohol or drugs. For the Second Chamber of the Supreme Court of Justice, tests can be carried out as long as this is reasonable in relation to the position to be occupied and the tasks that the worker must perform.

HIRING OF EMPLOYEES

Preference and discrimination

9 | Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There are no legal provisions that establish a preference during hiring. If preference is given to individuals or groups of people at the hiring stage, the employer must demonstrate that this decision is based on objective and reasonable reasons, such as collaborating in hiring people at risk of exclusion (such as working mothers, people with disabilities, indigenous people and migrants).

10 | Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Verbal employment contracts are of an exceptional nature, so they are only guaranteed for agricultural or livestock work carried out in the field (excluding those of an industrial nature) and accidental and temporary work not exceeding 90 days. In all other cases, the labour contract must be stipulated in writing in accordance with articles 23 and 24 of the Labour Code.

In the absence of a written contract, the employer has the duty to prove all working conditions. Documentary evidence is the main type of evidence used to prove all working conditions (articles 25 and 478 of the Labour Code).

There are no official forms of an employment contract, so only the following minimum content should be respected:

- names and surnames, nationality, age, sex, marital status and domicile of the contracting parties;
- identity document number;
- accurate detail of the worker's residence;
- duration of the contract or the expression of 'being for an indefinite period' for specific work or at a fixed price;
- working hours;
- salary, wage or participation (eg, commission) to be received by the worker and details related to the form, period and place of payment;
- the quantity and quality of the material, the state of the tools and the employer's tools, if any, that will be provided to execute the work, and details of when they will be placed at the disposal of the worker;
- the place or places where the service must be provided or the work executed;
- other stipulations to which the parties agree; and
- the place and date of the conclusion of the contract.

11 | To what extent are fixed-term employment contracts permissible?

The fixed-term work contract is enshrined in articles 26 and 27 of the Labour Code. A fixed-term contract must be stipulated for a period not exceeding one year, including its extensions; however, if special technical preparation is required, it can be extended to up to five years.

If, at the end of a fixed-term contract, the cause and the nature of the work subsists and is not renewed, it shall be interpreted as indeterminate for the benefit of the worker and for the payment of the resultant compensation.

Probationary period

12 | What is the maximum probationary period permitted by law?

The law does not establish a trial period. The concept of trial period is often confused with the three-month initial term of contracts, in which it is possible to end the contract without any justification and without the employer having to pay compensation for dismissal (articles 28 and 29 of the Labour Code).

However, if a probationary period is established that is justified by the nature of the position, it should be for a reasonable period of time. In the same way, the objectives that must be met and the evaluations to be practised during this period should be explained to the worker.

Classification as contractor or employee

13 | What are the primary factors that distinguish an independent contractor from an employee?

A worker is any person who, according to article 4 of the Labour Code, provides a personal service that is remunerated and mainly under subordination (receives orders, has his or her work supervised and is punishable).

An independent contractor carries out the work assuming his or her own risk and is not subordinated to any person.

For the labour courts, some of the characteristics that can distinguish subordinate workers from independent contractors are the following:

- the existence of a personal service provision;
- the exclusivity in the provision of work;
- the benefit of work in the employer's facilities;
- the existence of fixed and periodic compensation;
- the provision of a work schedule to the employee;
- the impossibility of rejecting the work entrusted to the worker;
- the affiliation to social security;
- the supply of tools and work materials;
- the duty to wear uniform or attire with the logo of the company; and
- the non-performance of activities at his or her own risk.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

There is no law that regulates the activity of recruitment agencies, nor is there legislation on the hiring of personnel through outsourcing companies. However, for the outsourcing company to be considered as the sole employer responsible for its employees, it must have financial and organisational capacity and autonomy (article 3 of the Labour Code).

FOREIGN WORKERS

Visas

15 | Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

There are no numerical limitations for the granting of short-term visas. According to article 68 of the General Migration and Immigration Act, it is possible to request the temporary residence of executives, representatives, managers and technical personnel of companies established in the country.

Spouses

16 | Are spouses of authorised workers entitled to work?

According to article 80 of the General Migration and Immigration Act, dependants of a worker who has the status of temporary resident, such as spouses, may be authorised to work.

General rules

17 | What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

According to article 177 of the General Migration and Immigration Act, foreign persons can only be hired if they have a work permit, a temporary or permanent residence that authorises them to work or another valid immigration status, such as refugee status. In the event of non-compliance, a fine will be imposed on the employer of between two and 12 times the amount of a base salary (in 2020, US$1,576 to US$9,461).

Resident labour market test

18 | Is a labour market test required as a precursor to a short or long-term visa?

According to articles 7(1) and 8 of the General Migration and Immigration Act, the authorisation of work permits for foreign persons shall take into account the opinions of a recommendatory nature prepared by the Ministry of Labour and Social Security, established in accordance with the labour situation of the country, if the incorporation of the foreign worker into the labour market is carried out without the displacement of national labour.

TERMS OF EMPLOYMENT

Working hours

19 | Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The limits to the working day cannot be waived by the worker (articles 135 and 136 of the Labour Code). The daily limits of the working day depend on whether it is a day shift (from 5am to 7pm), night shift (7pm to 5am) or mixed shift. For a day shift, the daily limit is eight hours, expandable to 10 hours if the work is not unhealthy or dangerous, with a weekly limit of 48 hours. For a night shift, the daily limit is six hours, with a weekly limit of 36 hours. For a mixed shift, the daily limit is seven hours with a weekly limit of 42 hours, expandable to a daily limit of eight hours if the work is not unhealthy or dangerous, with a weekly limit of 48 hours.

If the mixed shift comprises 3.5 hours or more within a night shift, it becomes a night shift for all legal purposes.

There are exceptional cases of workers whose working hours can be 12 hours a day and 72 hours a week (article 143 of the Labour Code), as is the case for managers or trusted personnel (ie, an employee that influences the strategic direction or corporate policies of the company), among others.

Overtime pay

20 | What categories of workers are entitled to overtime pay and how is it calculated?

Except for adolescent workers (between the ages of 15 and 18), all workers have the right to work overtime. Overtime is prohibited in unhealthy or dangerous work or when the daily workday exceeds 12 hours, taking into consideration the ordinary and extraordinary hours. Overtime cannot be habitual or permanent. It is calculated based on the limits of the working day (whether on the legal maximum or agreed between the parties if the standard daily hours are less than the legal maximum). Overtime must be remunerated with 50 per cent more than the ordinary salary. On holidays or weekly rest days, its value is tripled (articles 139, 140, 149 and 152 of the Labour Code).

21 | Can employees contractually waive the right to overtime pay?

Such a resignation is not valid, nor can overtime be subject to compensation with free time or rest. However, the courts admit that contracts can include an 'integral' salary, which expressly indicates that it is an understanding of the overtime worked. This will be valid as long as the remuneration received for the ordinary and extraordinary working hours exceeds the legal minimums.

Vacation and holidays

22 | Is there any legislation establishing the right to annual vacation and holidays?

Article 153 of the Labour Code establishes that every worker has the right to annual paid vacation, establishing a minimum amount of two weeks for every 50 weeks worked. In the event that the annual period is not completed, the worker will be entitled to at least one day of vacation for each month worked. However, the right to vacation may be extended by a collective agreement between the employer and workers.

As for holidays (articles 147 and 148 of the Labour Code), these are classified as compulsory payment holidays (1 January, 11 April, the Thursday and Friday of Holy Week, 1 May, 25 July, 15 August, 15 September and 25 December) and non-mandatory payment holidays (2 August and 12 October). If an employee does not work on these days, only the compulsory payment holidays give the right to a paid salary. If an employee works during any class of holiday, he or she is entitled to triple the ordinary salary.

Sick leave and sick pay

23 | Is there any legislation establishing the right to sick leave or sick pay?

Workers must be enrolled in the sickness and maternity insurance administered by the Costa Rican Social Security Fund, and the employer must sign and pay the occupational risk policy administered by the National Insurance Institute. Under both regimes, the worker may be compensated for his or her work.

Leave of absence

24 | In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Only the following licences or permits are recognised by law:

- Permission to exercise a vote: with salary for the time necessary to attend the voting centre, both in national elections or referendums and to decide their support for a call to strike (articles 69(j) and 381 of the Labour Code).
- Maternity leave: with salary for four months (one month before delivery and three months after). In the case of multiple births, it is extended by one month for each newborn. In the case of adoption, it is three months (article 95 of the Labour Code).
- Licence to assist family members in the terminal phase of illness or minors who are seriously ill: without salary for the time determined by the doctor (article 1 of Law No. 9353).
- Nursing leave: with salary for a total of one hour per day for the duration of the breastfeeding period (article 97 of the Labour Code).
- Permission for a medical appointment: without salary, for the time necessary to go to the medical centre and receive care.
- Permission for judicial summonses: with salary, for the time necessary to attend as a witness or as a party to a trial or to attend court hearings (article 515 of the Labour Code).

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

The benefits regulated by law, in addition to the licences or permits, are: the ordinary salary equal to or higher than the legal minimum wage (the annual fix), the annual bonus (or 13th month), annual leave (two weeks), holidays (11 days a year), weekly rest (one day) and retirement owing to permanent disability, age, the loss of parents or widowhood.

Part-time and fixed-term employees

26 | Are there any special rules relating to part-time or fixed-term employees?

There is no regulation for part-time work. Fixed-term work must be justified according to the temporary nature of the services rendered (article 27 of the Labour Code) and cannot exceed one year.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Employers are not required to publish any information related to the payment of their employees. However, labour inspectors from the Ministry of Labour and Social Security or the Costa Rican Social Security Fund can demand the delivery of this information.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

There are no legal rules on these clauses. However, the Second Chamber of the Supreme Court of Justice has recognised the validity and reasonableness of the post-contractual non-compete clause as long as it is remunerated.

Post-employment payments

29 | Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

As a requirement of the validity of the covenant, remuneration must be established. In the absence of an agreement between the parties on the amount, in one particular case, which does not constitute case law, the courts agreed to a 50 per cent payment of the salary that the worker was receiving when he ceased working for the duration of the clause.

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

30 | In which circumstances may an employer be held liable for the acts or conduct of its employees?

In general, according to article 1048 of the Civil Code (Law No. 3 of 26 April 1886), the employer is liable for the damage caused by a worker in the exercise of his or her duties where it is proven that there is a fault in the designation or in the absence of surveillance attributable to the employer, except for the exceptions established by the same civil law.

Regarding violations of labour and social security laws, the employer is directly responsible for the breach and jointly responsible where a judicial process for the actions is carried out on its behalf by employees (article 676 of the Labour Code).

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

The following are taxes related to employment:

- income tax on the worker's salary (progressive rate);
- the employer's contribution to the Costa Rican Social Security Fund and other government social security institutions (26.33 per cent of salary); and
- the worker's contribution to the Costa Rican Social Security Fund and other government social security institutions (10.34 per cent of salary).

The employer is solely responsible for withholding and depositing these taxes or fees, and in cases of a worker's non-compliance with his or her responsibility, it must also assume the payment of contributions that the worker should have made.

EMPLOYEE-CREATED IP

Ownership rights

32 | Is there any legislation addressing the parties' rights with respect to employee inventions?

According to article 40 of the Law on Copyright and Related Rights, when the worker creates intellectual property, he or she will retain on them a personal, inalienable, renounceable and perpetual moral right. However, through the employment contract, the worker may assign the exploitation rights to the employer and, in particular, the economic rights enshrined in article 16 (reproduction, distribution, transformation, public communication and any other rights necessary for commercialisation or total or partial exploitation).

Trade secrets and confidential information

33 | Is there any legislation protecting trade secrets and other confidential business information?

There is no special law; however, the disclosure of technical, commercial or manufacturing secrets is considered a just cause for dismissal. In addition, the revelation of confidential information is considered to violate the general obligation of good faith (articles 19, 71 and 81 of the Labour Code).

DATA PROTECTION

Rules and obligations

34 | Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Law of Protection of the Person against the treatment of their personal data, Law No. 8968 of 7 July 2011, regulates individuals' informed self-determination on their personal information.

According to article 5 of the Law, if the employer collects and stores personal information about its employees, it must inform them of:

- the existence of a personal database;
- the purpose of the data collection;
- the recipient of the information;
- the treatment of the information;
- whether the answers to the questions that are formulated for the data collection are mandatory or optional;
- the rights that assist the person giving the data;
- the consequences of refusing to give the data; and
- the identity and address of the person responsible for the database.

The employer is obliged to store information that is only accurate, truthful, precise, current and according to the purpose for which it was collected (article 6).

35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

Article 5 of Law of Protection of the Person against the treatment of their personal data, Law No. 8968 of 7 July 2011 establishes that the employer must have the prior and informed consent of the worker to start the collection and storage of data. This same treatment is applied not only to the worker hired but also to the information obtained from the candidates for the position during the recruitment and selection processes.

36 | What data privacy rights can employees exercise against employers?

Article 7 of the Law of Protection of the Person against the treatment of their personal data, Law No. 8968 of 7 July 2011, recognises, in favour of workers, the right to access the information that the employer collects and stores about them that is of a personal nature.

The right includes the power for the individual in question to:

- receive confirmation about the existence of personal data in the files or databases of the employer;
- receive the information regarding him or herself, the purpose for which the information was collected and the use of the personal data;
- be informed about all existing records; and
- have knowledge of the system, programme or method used to process his or her personal data.

The Law also establishes the right for the employee to request the rectification, update or deletion of his or her personal data when the data is incomplete, inaccurate or has been collected without his or her authorisation or against the provisions enshrined in the law.

BUSINESS TRANSFERS

Employee protections

37 Is there any legislation to protect employees in the event of a business transfer?

The Second Chamber of the Supreme Court of Justice has established that the worker does not have the duty to know who his or her employer is, so in the case of a commercial transfer, the worker can sue any of the companies involved in the commercial transfer that he or she considers to be his or her employer. Subsequently, it will lie with the judge to define, in a judicial resolution, which of the parties involved in the commercial transfer is considered as the employer and is, therefore, responsible for the employee's claim.

Likewise, article 37 of the Labour Code establishes that employer substitution must not affect workers. Therefore, the replaced employer will be jointly and severally liable with the new employer for the contractual and legal obligations contracted before the replacement and for six months after the replacement. After the stipulated period, the new employer will be solely responsible.

TERMINATION OF EMPLOYMENT

Grounds for termination

38 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

In the private sector, free dismissal applies, so the employer can dismiss a worker without just cause, based on his or her own will, but with the payment of the corresponding labour indemnities (article 85(d) of the Labour Code).

The Labour Code also has a list of grounds for disciplinary dismissal for individual (article 81) and collective (article 369) reasons, in which case no compensation is paid.

There may also be a dismissal for health reasons when it is not possible to relocate the worker within the workplace (article 254), with employer responsibility.

Notice

39 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

There is a reciprocal obligation between the parties to give the other party notice, once the first three months of the employment relationship have elapsed. The duration of the notice varies according to the length of the employment relationship (article 28 of the Labour Code). If the notice cannot be given in time, monetary compensation can be given. During the notice period, the worker is entitled to take one paid day off per week to find a new position.

The employer can waive the notice given by the worker, without having to compensate him or her for it.

40 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

The employer should not give notice if the dismissal proceeds without employer responsibility; that is, for a serious fault attributable to the worker. Notice is not required in the case of fixed-term contracts, which conclude by the agreed expiry of the term or on completion of the work, provided that a period of one year has not been exceeded.

Severance pay

41 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

When the worker is dismissed without just cause in contracts for an indefinite period, he or she must be compensated with notice and severance (articles 28 and 29 of the Labour Code).

Notice is calculated as follows: if the employment relationship is between three and six months, the notice period is one week; if the employment relationship is between six months and one year, the notice period is 15 days; and if it is more than one year, then one month's notice is required.

The severance must be calculated as follows: if the employment relationship is between three and six months, it must be seven days' pay, and if it is between six months and one year, it must be 14 days' pay. After one year, the following scale is applied:

- one full year: 19.5 days per year worked;
- year two: 20 days per year or a fraction greater than six months;
- year three: 20.5 days per year or a fraction greater than six months;
- year four: 21 days per year or a fraction greater than six months;
- year five: 21.24 days per year or a fraction greater than six months;
- year six: 21.5 days per year or a fraction greater than six months;
- years seven to nine: 22 days per year or a fraction greater than six months;
- year 10: 21.5 days per year or a fraction greater than six months;
- year 11: 21 days per year or a fraction greater than six months;
- year 12: 20.5 days per year or a fraction greater than six months; and
- year 13 and above: 20 days per year or a fraction greater than six months.

The term 'a fraction greater than six months' means that, if the employee has worked for a period greater than six months during a year, a value equal to the scale that corresponds to his or her seniority must be added to the severance payment. In no case can the compensation be more than the previous eight years of employment, and the maximum seniority that can be recognised for severance pay is eight years. Both the notice and the severance pay are calculated using the average total salary of the previous six-month period worked.

When the worker is dismissed without just cause from a fixed-term contract, he or she must be compensated with a fixed indemnity and compensation (article 31 of the Labour Code).

In fixed-term contracts and for specific occupations, each of the parties may terminate the contract, without just cause, before the advent of the term or the conclusion of the work, paying the other the specific provable damages and losses in relation to the duration of the contract resolved, the importance of the role performed and the difficulty that the worker has in procuring an equivalent position of employment, or that the employer has in finding a substitute, all in the judgment of the labour courts.

When the employer exercises the power referred to above in a fixed-term contract situation, he or she must also pay the worker, at the time of the termination of the contract, an amount corresponding to one day's salary for every seven days of continuous work executed or percentage of that time; this must be at least three days' salary.

However, if the contract has been stipulated for six months or more, or the execution of the work, owing to its nature or importance, takes six months or longer, the compensation must be at least 22 days' salary.

Procedure

42 | Are there any procedural requirements for dismissing an employee?

There is no requirement to follow due process before dismissal. Only in the case of workers with special status is it necessary to process and obtain judicial or administrative authorisation before the dismissal (article 540 of the Labour Code).

At the end of the contract, for whatever reason, the employer must provide a certificate indicating the period worked and the work performed, and only if the worker requests will it indicate the manner in which the work was done and the cause for termination. If it is a dismissal with just cause, the facts that support it must be detailed (article 35 of the Labour Code), and those are the only ones that may be discussed later in court.

Employee protections

43 | In what circumstances are employees protected from dismissal?

The following employees are protected from dismissal:

- women who are pregnant or breastfeeding (article 94 of the Labour Code);
- workers forming a trade union, representatives and union candidates and representatives freely chosen by the workers (article 367 of the Labour Code) and those protected by any other protective provision of the trade union immunity (article 540 of the Labour Code);
- workers reporting sexual harassment (Law against Sexual Harassment in Employment and Teaching); and
- workers participating in a collective economic and social conflict, a conciliation, arbitration, strike or procedure, in the case of a failed collective agreement (articles 394 and 620 of the Labour Code).

For the aforementioned workers, a due process must be followed before the Ministry of Labour and Social Security to prove the worker's non-compliance and to obtain approval before the dismissal. For adolescent workers of between 15 and 18 years of age (article 91 of the Code on Children and Adolescents), the same procedure is required to dismiss them without employer responsibility. However, in the event that the dismissal is with employer responsibility, the calculation of the indemnities that will be paid must be sent to the Ministry of Labour so that the estimate can be revised.

Mass terminations and collective dismissals

44 | Are there special rules for mass terminations or collective dismissals?

There are no requirements or special procedures for the exercise of a collective dismissal. The collective labour contract, although regulated in article 49 of the Labour Code, has no practical application.

Class and collective actions

45 | Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

The unions can sue the protection of collective interests derived from legal conflicts, as well as represent their workers in conflicts of economic and social interests; they can also file an appeal in a court of cassation in the interest of the legal system against final judgements without having to be parties to the process, and can engage in a conciliation and arbitration process to resolve the existing conflict (articles 446, 600, 602, 618 and 635 of the Labour Code).

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Mandatory retirement age

46 | Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

There is no law that imposes a mandatory retirement age for workers. The Constitutional Chamber of the Supreme Court of Justice has declared unconstitutional any legal norms that did so under the argument that those norms were based on a presumption that at a certain age, someone is 'useless, incapable and almost useless' and is an 'absolutely irrational and unjustified' measure (Judgment No. 1146-1990, 21 September 1990).

A private sector worker who has retired because of his or her age can be re-employed in the private or public sector without any limitation. A public sector employee who has retired because of his or her age cannot return to work.

DISPUTE RESOLUTION

Arbitration

47 | May the parties agree to private arbitration of employment disputes?

The clauses of the contract that refer labour disputes to conciliation or arbitration do not prevent the worker from later claiming judicially. However, if desired, the differences can be submitted to conciliation or arbitration at the administrative headquarters before the Ministry of Labour, in judicial offices before the labour courts and at alternative conflict resolution centres, which are private centres duly registered with the Ministry of Labour (the Law on Alternative Resolution of Conflicts and Promotion of Social Peace, Law No. 7727 of 9 December 1997 and article 456 of the Labour Code).

Employee waiver of rights

48 | May an employee agree to waive statutory and contractual rights to potential employment claims?

Resignations made by workers to their legal rights or included in their employment contracts are absolutely null and void (article 11 of the Labour Code), including waivers to file judicial or administrative claims (Second Chamber of the Supreme Court of Justice, No. 363-2006, 23 May 2006).

Limitation period

49 What are the limitation periods for bringing employment claims?

The statute of limitations for the worker to claim rights and actions from employment contracts is one year, counted from the date of termination of the contract (article 413 of the Labour Code). However, the claim will be interrupted:

- if a request that the dismissal letter be extended is made;
- if a request for the administrative work conciliation procedure before the Ministry of Labour and Social Security is made;
- if a claim for risks of the work in administrative headquarters before the National Institute of Insurance is filed; and
- by any judicial or administrative diligence made by the worker to demand the collection of his or her right.

The prescription will not run while the worker remains working under the orders of the employer.

UPDATE AND TRENDS

Key developments of the past year

50 Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

No updates at this time.