Labour & Employment 2020

Contributing editors
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LEXOLOGY®
Getting The Deal Through

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Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2006
Fifteenth edition
ISBN 978-1-83862-357-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Morgan Lewis

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Angola, Belgium, Ghana, Israel, Kenya, Myanmar, Netherlands, Poland, Slovenia, Turkey and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, Sabine Smith-Vidal, Walter Ahrens, K Lesli Ligorner and Mark Zelek of Morgan Lewis, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
May 2020

Contents

Argentina

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LEGISLATION AND AGENCIES

Primary and secondary legislation

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

Constitutional provisions

The National Constitution (NC) grants the right to work and protects work in all its forms. It guarantees to employees the following rights:

- decent and equitable labour conditions;
- limited workday;
- fair compensation;
- minimum wage;
- equal compensation for equal tasks;
- paid annual vacations;
- participation in the company's profits;
- protection against termination without cause;
- stability of public employment; and
- free and democratic trade union organisation.

It also establishes that the state will grant social security benefits, which must be complete and irrevocable, especially mandatory social insurance.

As for trade union rights, the NC guarantees freedom of association and the rights to:

- enter into collective bargaining agreements;
- initiate conciliation or arbitration procedures;
- go on strike; and
- the stability of any union representative's job position (NC, section 14-bis).

In addition, the NC establishes the prohibition to discriminate, and employees' rights to privacy and freedom of expression (NC, sections 14, 16 and 19).

International treaties

Argentina is part of several international treaties that apply on employment matters. Some of them have constitutional status, such as the:

- Universal Declaration of Human Rights;
- Inter-American Convention of Human Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Convention on the Rights of the Child;
- Convention on the Elimination of all Forms of Discrimination against Women; and
- International Convention on the Elimination of all Forms of Racial Discrimination.

The above-mentioned treaties have constitutional status and prevail over national laws.

Argentina has also ratified the main conventions of the International Labour Organization, such as the:

- Forced Labour Convention (C29);
- Freedom of Association and Protection of the Rights to Organize Convention (C87);
- Protection of Wages Convention (C95);
- Right to Organize and Negotiate Collective Bargaining Convention (C98);
- Equal Remuneration Convention (C100);
- Abolition of Forced Labour Convention (C105);
- Discrimination (Employment and Occupation) Convention (C111);
- Minimum Age Convention (C138);
- Collective Bargaining Convention (C154); and
- Worst Forms of Child Labour Convention (C182).

Main statutes and regulations

Labour relationships are mainly regulated by the National Employment Law No. 20,744 (NEL) and its amendments. It covers the majority of labour relationships in their different modalities and the consequences thereof, such as:

- employers' and employees' rights and obligations;
- the main mandatory principles that govern labour relationships;
- compensation;
- annual vacation and special leave of absence provisions;
- holidays and non-working days;
- daily and weekly working and resting hours;
- special provisions for women and child workers;
- illness;
- assignment of the employment contract;
- its termination; and
- employees' privileges.

Certain activities, such as public sector employment, personnel of private houses and agricultural work, are excluded from the NEL and are governed by special laws.

The NEL establishes labour public order provisions, which may not be waived by agreement of the parties, and governs an individual's employment relationship. It also sets out the principles that will apply in the event of a conflict.

Law No. 24,013 regulates, inter alia:

- temporary personnel service companies;
- the protection of unemployed workers; and
- the applicable fines and penalties for non-registration and incorrect registration of labour relationships.

Law No. 25,877 amended the NEL, including changes on:

- the trial period applicable to indefinite employment contracts;
- prior notice;

- the calculation of severance payments owing to dismissal with no cause; and
- promotion of employment.

Law No. 24,467, amended by Law No. 25,300, provides certain benefits to companies that have no more than 40 employees and that have a net annual billing not exceeding a sum determined by regulation. The benefits include, inter alia, less restrictive regulations on bonuses and vacations.

The Retirement and Pension Law No. 24,241, amended by Law No. 26,425 and by Law No. 27,426, mainly determines:

- the requirements to be met to apply for retirement;
- the rules governing pension funds; and
- employers' and employees' obligations regarding social security issues.

Labour Risks Law No. 24,557, Decree No. 1,649/2009, Resolution No. 35,550, Law No. 26,773, Decree No. 49/2014, Decree No. 472/2014 regulating Law No. 26,773 and Law No. 27,348 regulate work-related accidents and professional hazards.

Workday Law No. 11,544 establishes the limits to the workday and overtime payment scheme. Law No. 25,323 determines fines for incorrect labour registration and failure to pay severance compensation in due time when termination with no cause occurs. Trade Unions Law No. 23,551 states the rights and duties of trade union representatives. Other relevant laws include Collective Bargaining Agreement Law No. 14,250 and Health and Safety Law No. 19,587.

Protected employee categories

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

The NC establishes the principle of equality before the law (section 16) which extends to salaries when stating 'equal compensation for equal tasks' (section 14-bis).

Under the Anti-Discrimination Law No. 23,592 (section 1) and the NEL (section 17), it is forbidden to discriminate against employees based on sex, race, nationality, religion, marital status, political or trade union ideas, age, disability or physical appearance.

Enforcement agencies

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

The Ministry of Labour and Social Security is the national authority in charge of establishing and executing public policies regarding employment and accomplishment of labour laws, and, together with the National Tax Authority, monitoring social security matters.

WORKER REPRESENTATION

Legal basis

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

The constitutional right of freedom of association allows the existence of employees' representatives in the workplace. The specific legislation of employees' representatives is the Trade Unions Law No. 23,551, which states the rights and duties of union representatives.

Powers of representatives

5 | What are their powers?

The main tasks of the union representative in the workplace are:

- representing employees before the employer and the trade union;
- monitoring the application of the legal or conventional rules and participation in the inspections performed by the different labour administrative authorities;
- meeting with employers;
- submitting any claims of employees on whose behalf they act before the employers or their representatives;
- publicising union communications; and
- giving advice and information to union representatives or leaders.

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?

Employees' personal information is protected by the Habeas Data Law No. 23,326. Background checks are permissible as long as the information:

- is not used for discriminatory purposes;
- does not violate the applicant's right to privacy;
- is used reasonably; and
- does not include criminal records.

Criminal records can only be required by a judge or, personally, by the prospective employee. The information cannot be required by employers or prospective employers.

Background checks may be conducted by the employer or a third party, and they must comply with data protection obligations.

Medical examinations

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

Pre-employment medical examinations are mandatory. Employers must carry out these exams to determine whether the applicant has the ability to carry out the activities related to his or her job position and to accurately determine pre-existing disabilities at the time of hiring the employee. To avoid discrimination issues, certain tests are excluded, such as those for HIV and Chagas disease. Additionally, in the public sector, pregnancy tests are not allowed.

It is common practice for pre-employment examinations to be made by the employer's labour risks insurer. The employer may refuse to hire an applicant who does not submit to a pre-employment examination.

Although not mandatory, there are other kinds of medical examinations the employer may conduct. These include:

- periodic examinations;
- examinations prior to a transfer of activity; and
- examinations prior to the termination of the employment relationship.

Drug and alcohol testing

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

Based on the constitutional right to privacy and the constitutional anti-discrimination principle and laws, conducting drug and alcohol tests may be considered a violation of the employees' privacy unless express

consent is obtained. In addition, non-hiring or termination based on the results of a drug and alcohol test may be considered discriminatory and, therefore, the candidate or employee may file a claim against the employer.

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?

It is prohibited to discriminate against employees based on sex, race, nationality, religion, marital status, political or trade union ideas, age, disability or physical appearance.

The National Constitution establishes the principle of equality before the law, which extends to salaries when stating 'equal compensation for equal tasks'.

In addition, provisions against discriminations may be found in:

- international treaties with constitutional status, such as the Convention on the Elimination of all Forms of Discrimination against Women and the International Convention on the Elimination of all Forms of Racial Discrimination;
- the conventions of the International Labour Organization, such as the Equal Remuneration Convention (C100) and the Discrimination (Employment and Occupation) Convention (C111);
- the National Employment Law (NEL), sections 17, 73, 81, 172 and 187;
- the Anti-Discrimination Law No. 23,592; and
- the Trade Unions Law No. 23,551, sections 7 and 53, subsection j.

Arbitrary discrimination, where employers make distinctions on unreasonable grounds, is prohibited. However, employers are allowed to make distinctions as long as they are based on objective criteria, such as productivity. As an integration tool, the Ministry of Labour and Social Security and the Ministry of Labour of the City of Buenos Aires have developed special programmes as well as provided fiscal benefits and free advice for potential employers interested in hiring disabled employees to its staff.

In addition, the only mandated preferences in hiring are established for the public sector under the quota system. It is mandatory for public agencies, state companies and public enterprises that carry out public services for a minimum of 4 per cent of their total personnel to be employees with a disability and 1 per cent to be transpersons (Law No. 22,341 section 8, amended by Law No. 25,689).

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

Since the applicable principle in this regard is the freedom of formality, parties may freely choose the form of the employment contract, except as provided by law or collective bargaining agreements in individual cases (NEL, section 48). Because of the continuity principle, the rule is that employment relationships are meant to be for an indefinite period of time, and there is no need to execute an employment agreement. The existence of the employment relationship will be determined based on the facts and subordination of the worker. For employment agreements other than those for an indefinite term, they must be in writing and comply with certain formal requirements, depending on the kind of employment agreement (eg, in the case of fixed-term workers, the employment contract must be in writing).

Notwithstanding the above, in regard to indefinite-term labour relationships, it is advisable to enter into written employment agreements to minimise the possible risks of misinterpretation.

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

Fixed-term employment agreements are an exception and may only be valid if they meet all the following requirements:

- the agreement must fix the term in writing;
- the term cannot exceed five years; and
- employers must justify, in writing, the objective cause for this type of agreement.

Making continuous use of fixed-term contracts or contracts with provisions that violate legal requirements will automatically convert the contract into an employment contract for an indefinite period.

Probationary period

12 What is the maximum probationary period permitted by law?

A probationary period of three months applies to all employment agreements for an indefinite period (NEL, section 92-bis). The probationary period is not applicable to fixed-term or temporary employment agreements. In addition, it may not be extended at the discretion of the employer since this is to the detriment of the worker and would, thus, be considered as a violation of public order provisions. However, the probationary period may be waived by the parties in writing.

Classification as contractor or employee

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

An employee is defined by law as any natural person who voluntarily renders services in favour of another within a legal, technical and economic subordination relationship in exchange for compensation.

There is no specific definition for an independent contractor. However, this type of relationship is characterised by the lack of any kind of subordination to the company, this being the main characteristic to distinguish them.

There is a legal presumption that the rendering of services implies the existence of a labour relationship, and the employer must prove otherwise.

Temporary agency staffing

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

The legislation that regulates temporary staffing through recruitment agencies is the NEL, sections 29, 29-bis and 99 and Decree No. 1,694/2006.

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?

No, there are no numerical limitations on short-term visas. The period for which a short-term visa is granted and renewed depends on the type of visa requested.

The key types of Argentine work permissions when transferring an employee from one corporate entity in one jurisdiction to a related entity in another jurisdiction are as follows:

- a transitory permit as a seasonal migrant worker for those entering the country to provide seasonal services for up to six months; and

- a temporary residence permit as a migrant worker for those entering Argentina to carry out a paid, permitted activity in an employment relationship for no longer than three extendable years on a multiple entry basis.

The applicable procedure and required documentation depends on the applicant's nationality (ie, whether the applicant is a national of a member country of Mercosur (Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, Venezuela (currently suspended), Guyana and Surinam)).

Non-Mercosur applicants must be sponsored by a local employer that must be registered with the Foreign Petitioners National Registration Office (RENURE).

Mercosur applicants may apply for permission to work independently and do not require a local employer to act as sponsor.

Spouses

16 | Are spouses of authorised workers entitled to work?

No, spouses must process their own permission 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?

If an employer based outside the country wants to transfer a foreign employee to work in Argentina, it must first establish an Argentine branch or subsidiary. In addition, if the employee to be transferred is from a non-Mercosur country, the Argentine branch or subsidiary must be registered with the RENURE.

An employer who hires foreign workers without migratory permission to work in Argentina may be sanctioned with a fine equal to 50 minimum wages for each foreigner employed. Currently, the minimum wage is equal to 16,875 Argentine pesos.

Resident labour market test

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

To hire a foreign worker, it is not necessary to conduct a labour market test to demonstrate that there are no local workers willing and qualified to undertake the position.

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?

According to the working day regulation (Law No. 11,544, section 1), the normal working hours for employees are limited to eight hours per day or 48 hours per week. The 48 hours may be distributed unequally over the week as long as they do not exceed nine hours a day, and employees do not work after 1pm on Saturday. The employer cannot opt out of those limitations.

Overtime pay

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

All workers, except directors and managers, are entitled to overtime pay. The salary for these supplementary hours will be calculated as follows:

- on normal working days (ie, Monday to Saturday up to 1pm), workers are entitled to their regular salary and an additional 50 per cent on top of their regular salary; and
- on Sundays, public holidays or after 1pm on Saturdays, workers are entitled to their regular salary and an additional 100 per cent on top of their regular salary.

It is prohibited for employees to work between 1pm on Saturday and midnight on Sunday; however, if for some reason the employer provides exceptional work on those days, the employer must grant paid compensatory rest of equal duration. If the corresponding compensatory rest is granted, the employee must be paid his or her regular salary for the exceptional work. If not, the employee is entitled to receive the corresponding additional payment on top of his or her regular salary.

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

Employees cannot waive their right to overtime pay since the provisions of this law are considered to be of public order.

Vacation and holidays

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

Employees are entitled to an annual vacation period when they have been employed with their employer for over six months. If the period of employment is less than six months, the employee will have an annual leave equivalent to one day off for every 20 days of effective work (the National Employment Law (NEL), sections 151 and 153).

Vacations are compulsory, and the employer must grant them between 1 October and 30 April. The duration varies according to the employee's seniority, as follows:

- less than five years of service: 14 consecutive days;
- more than five and less than 10 years of service: 21 consecutive days;
- more than 10 and less than 20 years of service: 28 consecutive days; and
- more than 20 years of service: 35 consecutive days.

The periods of annual leave mentioned above apply unless increased benefits are established in the applicable collective bargaining agreement (CBA) or in the individual employment agreement.

Sick leave and sick pay

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

According to the NEL, section 208, if the employee has an accident or suffers an illness, he or she must be paid compensation that cannot be less than what he or she would have been paid if he or she continued working if the accident or illness:

- is not related to the job and is not a consequence of an employee's intentional act;
- prevents the employee from rendering services; and
- takes place during the employment relationship.

If all the above-mentioned requirements are met, the employer must provide sick leave according to the employee's seniority, as follows:

- less than five years of service and no family allowances: three months of paid leave; and
- five years of service or more and no family allowances: six months of paid leave.

If the employee has family allowances, the periods are six and 12 months respectively.

The employer is responsible for paying the employee the corresponding compensation for as long as the sick leave lasts.

If the paid sick leave period finishes and the employee is not able to resume his or her job, the employee has the right to keep his or her work position for 12 months, but the employer does not have to pay the employee's salary during this period.

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?

According to the NEL, section 158, the employee can take a paid leave of absence in the flowing circumstances:

- for the birth of the employee's child: two consecutive days;
- for the employee's marriage: 10 consecutive days;
- for the death of the employee's spouse, common-law husband or wife, child or parent: three consecutive days;
- for the death of a brother or sister: one day; and
- for secondary or university exams: two consecutive days for each, with a maximum of 10 days per calendar year.

The periods of special leave mentioned above apply unless longer periods are established in the applicable CBA or the employment agreement.

Within the framework of the worldwide health scenario regarding the coronavirus, on 6 March 2020, the Ministry of Labour and Social Security issued Resolution No. 178/2020, which establishes an extraordinary leave of absence for all employees coming from abroad. The main points of the Resolution are as follows.

- The leave applies to all employees from the public and private sector who are arriving from overseas. There is no distinction between those arriving from the identified high-risk zones and those arriving from other countries; the leave would apply regardless of the place of departure of the individuals.
- The employer shall grant this leave if the employee voluntarily decides to stay at his or her home to avoid accelerating the spread of the coronavirus since it is spread from person to person.
- The leave will not affect employees' salaries and any additional amounts granted by any applicable CBA. In addition, this leave will not be considered to limit the application of any other leave granted by law or by a CBA.
- The Resolution empowers the Secretary of Labour to issue regulatory and complementary provisions that may be necessary. Although these complementary rules have not yet been passed, we believe that they are necessary to clarify certain undetermined issues, such as the countries at risk and the term of the leave.
- Although there is no specific information about the duration of the leave, the Ministry of Health suggests that the term should be at least 14 calendar days, counting from the exposure to the virus, so we recommend that the term be counted from the date on which the employee arrives in Argentina.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

Employers and employees must contribute to the Social Security Administration for:

- mandatory retirement and pension;
- healthcare insurance;
- the family allowances system;
- health and medical services for retired people;
- labour risk insurance; and
- unemployment fund.

In addition, employees must be paid for vacations, as well as a supplementary annual salary in two periods during the year. The employer must pay an annual bonus in two instalments (30 June and 18 December) equivalent to 50 per cent of the best monthly salary earned in the preceding six-month term.

Part-time and fixed-term employees

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

The special rules relating to fixed-term employees are as follows:

- An essential condition is that the parties must execute a written contract in which the fixed term is agreed.
- An extraordinary cause is also required by law to duly justify a fixed-term contract (NEL, section 90).
- Making continuous use of fixed-term contracts or contracts with provisions that violate legal requirements will automatically convert the contract into an employment contract for an indefinite period.
- There is a maximum five-year term (NEL, section 93).
- Prior notice of termination is required. The absence of giving prior notice cannot be replaced by any compensation and will convert the contract into one for an indefinite period of time. Prior notice must be given no less than one month and not more than two months before the termination. The only exception is a fixed-term contract with a duration of less than one month, in which case no notice is required (NEL, section 94).
- Regarding the compensation due for terminating a fixed-term contract, if an unfair dismissal occurs before the term agreed upon is finished, the employee is entitled to the corresponding compensation (severance compensation due for termination without cause, calculated on seniority compensation) as well as a special compensation for damages, which is usually determined by calculating the wages due up to the agreed date of termination (NEL, section 95).
- At the end of the fixed term, the termination of the period does not entail the employer's liability to pay compensation unless the contract period is more than one year. In such a case, the employer must pay a severance compensation equivalent to 50 per cent of regular severance compensation (NEL, sections 95 and 250).
- The trial period does not apply to fixed-term employment contracts.

Part- time employees are regulated, mainly, by the following regulations:

- Under a part-time job scheme, the employee commits to render services for a certain number of hours during the day, week or month, provided that the number of hours is less than one-third of the customary working hours within the corresponding activity.
- Compensation cannot be lower than the pro rata compensation for an employee performing services on a full-time basis.
- There is no cap on the number of part-time employees an employer may hire.
- Although it is not mandatory to execute a contract in writing, it is advisable to do so for any part-time employment.

Public disclosures

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

There are no specific rules that require employers to collect or disclose employee pay information publicly (to other employees, to

the government or to third parties, such as unions). Nevertheless, if employees are under a particular CBA, employers must notify the union of their compensation but only for the purpose of calculating the amount of union contributions to be made (not as a way of verifying compliance with equal pay between men and women and minorities or historically disadvantaged groups).There are no specific rules that require employers to collect or disclose employee pay information publicly (to other employees, to the government or to third parties such as unions).

Nevertheless, if employees are under a particular CBA, employers must notify the union of their compensation but only for the purpose of calculating the amount of union contributions to be made (not as a way of verifying compliance with equal pay between men and women and minorities or historically disadvantaged groups).

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

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

Post-employment non-competition or non-solicitation agreements are not regulated by law. However, labour courts have admitted these agreements under certain circumstances. Therefore, to be enforceable, post-employment agreements have to comply with certain requirements as established by case law.

- The agreements must be limited to a reasonable period. In Argentina, the duration of these covenants after termination is not regulated statutorily. However, courts will conduct a fact-specific inquiry on a case-by-case basis to determine whether any of these covenants are reasonable in duration. Most case law in Argentina has ruled that a reasonable restriction should not exceed two years.
- The employee's compliance with these covenants should not affect or limit the employee's constitutional right to work (the National Constitution, section 14).
- In the event that the post-employment compliance of these covenants affects the employee's right to work, a payment of an amount approximate to 70–100 per cent (depending on negotiation and the extent of the restriction) of the employee's monthly salary for the period the covenant is effective must be granted as consideration for compliance with the duty for these agreements to be enforceable.

In short, as post-employment covenants of these types are not expressly banned in Argentina, they are not regulated. However, for them to be valid, there must be a balance between these covenants, trade secret protection and the employee's constitutionally granted right to work; otherwise, they will be null and void and, thus, not enforceable in Argentina.

Post-employment payments

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

In the event that a restrictive agreement affects an employee's right to work, a payment of an amount approximate to 70–100 per cent (depending on negotiation and the extent of the restriction) of the employee's monthly salary for the period the covenant is effective must be granted as consideration for compliance with the duty for these agreements to be enforceable.

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?

The employer may be held liable for the acts or conduct of its employees when damage is caused during the rendering of his or her services (the National Civil and Commercial Code, section 1,753).

For example, for mobbing or moral harassment, companies may be held liable if, knowing the existence of the hostile working place, no measures were taken to prevent such a situation (a breach of the employer's duty of safety).

TAXATION OF EMPLOYEES

Applicable taxes

31 What employment-related taxes are prescribed by law?

The applicable employees' and employers' related withholdings and contributions and payments are as follows.

Employee's withholdings (total over monthly gross compensation: 17 per cent), comprising:

- retirement (11 per cent);
- health and medical services for retired people (3 per cent); and
- health and medical services (3 per cent).

Employees' withholdings are capped at 159,028.80 Argentine pesos.

Employer's contributions (total over monthly gross compensation: 27 or 23 per cent, depending on the type of enterprise), comprising:

- retirement (12.71 or 10.17 per cent);
- health and medical services for retired people (1.62 or 1.5 per cent);
- family allowances (5.56 or 4.44 per cent);
- unemployment fund (1.11 or 0.89 per cent); and
- health and medical services (6 per cent).

There is no cap for employer's contributions.

The employer acts as a deduction agent and must withhold the employee's contribution from wages. In addition to the social security contributions, income tax must also be withheld from the employee's wages.

EMPLOYEE-CREATED IP

Ownership rights

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

The Patent Law No. 24,481, section 10 and the National Employment Law (NEL), section 82 are the regulations that govern the parties' rights with respect to employee inventions.

Trade secrets and confidential information

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

In Argentina, the NEL, sections 85 and 88 state the employee's duties of loyalty and fidelity. Employees must refrain from interfering or competing with the employer's business during the relationship. In addition, Law No. 24,766 on Confidential Information addresses the duty of confidentiality and protection of trade secrets.

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?

An employee's right to privacy and personnel data is protected by the National Constitution, section 43, and the Habeas Data Law No. 25,326.

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

When employers request personal data from any employee, he or she must be notified in advance and in an express and clear manner about the:

- purpose for which the data needs to be processed, and who can use the data;
- existence of the relevant data file or register, whether electronic or otherwise, and the identity and domicile of the responsible person;
- compulsory or discretionary character of the information requested;
- consequences of providing the data, of refusing to provide the data or of providing inaccurate data;
- The possibility that the data owner has to exercise the right of data access, rectification and suppression.

Processing personal data requires express consent from the data owner, which must be accompanied by appropriate information, in a prominent and express manner, explaining the nature of the consent sought. This can be achieved by the employee signing a general consent form. However, consent can always be withdrawn by an employee. The data owner's consent must be express and in writing.

Consent is not required if the data:

- has been obtained from a source of unrestricted public access;
- has been collected for the performance of the state's duties;
- consists of lists limited to name, identification number, tax or social security identification, occupation, date of birth, domicile and telephone number; and
- arises from a contractual relationship, either scientific or professional, and is necessary for its development or fulfilment.

The collection of information related to an employee's private life is permissible as long as the information collected:

- is not used for discriminatory purposes;
- does not violate the individual's right to privacy; and
- is used reasonably.

36 What data privacy rights can employees exercise against employers?

The data privacy rights that employees may exercise against employers are the right to:

- access the personal data;
- modify, rectify or suppress any incorrect or false information: every employee has the right to rectify, update and, when applicable, suppress or keep confidential his or her own personal data stored in a personal database. In particular, if the personal data has been transferred to a third party, the third party must be notified of any rectification or deletion of the data within five days of the amendments or deletion being made;
- grant or not grant his or her consent; and
- withdraw his or her consent.

BUSINESS TRANSFERS

Employee protections

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

There are two possible situations in Argentina stipulated by the National Employment Law: a transfer of undertaking (section 225) or an assignment of employees (section 229).

In a transfer of undertaking, all obligations arising from employment contracts are transferred to the takeover party, transferring even those obligations originated by reason of the transfer. The employment contract continues with the new employer, and the employee maintains the acquired seniority, his or her labour conditions and all the rights arising from it.

However, the employee may consider him or herself constructively dismissed by fault of the employer if, by reason of the transfer, he or she suffers damage serious enough to imply the impossibility of continuing the labour relationship. These are cases where, by reason of the transfer, the essential employment contract conditions are modified or seniority is not acknowledged.

In an assignment of employees without a transfer of undertaking, the express written agreement of the employee is required, and the same rules that govern the transfer of undertaking apply.

The transferring entity and the takeover party are jointly and severally liable regarding the obligations arising from the employment contracts existing at the time of the transaction.

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?

The employer may dismiss an employee without cause, paying the compensation established by the National Employment Law (NEL), section 245, and other mandatory concepts, taking into account all the preventive measures for the dismissal not to be considered as a discriminatory act.

An employer may also dismiss an employee with cause, provided that it can prove the grounds for the dismissal. If the employer has evidence to establish grounds for dismissal, it should not pay any compensation to the employee (NEL, section 242). Dismissal with cause must be the last recourse after having implemented other disciplinary measures, or the offence should be serious enough that it would make the continuity of the relationship impossible.

Legislation imposes certain requirements for dismissal with cause, namely the:

- notification of dismissal must be in writing;
- cause and reasons alleged as the grounds for termination must be clear, accurate and detailed; and
- alleged cause cannot be changed in successive legal notifications or during the judicial process.

In the event that the cause is challenged before a court of law and the requirements were not met, there is a high chance that the judge will rule that an employer has failed to comply with the legal requirements and order it to pay severance compensation as if termination was with no cause. Each judge who is presented a dispute about termination with cause must objectively evaluate:

- the facts giving rise to the dispute to determine whether there was cause for dismissal; and
- whether the formal requirements of notification were accomplished.

The party arguing for the existence of the offence that resulted in termination must submit evidence supporting the cause. However, the decision on whether the cause was sufficient lies with the judge, who analyses the facts and evidence in accordance with the labour regulations and principles that govern employment relationships.

Notice

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

In Argentina, there is no automatic extinction of the labour relationship. It is essential to notify the employee of his or her dismissal. The notification must be made through reliable means of communication to document the exact date and circumstances of the dismissal. Means of notification are:

- legal notification;
- notary deed; or
- personal written communication that must be signed by the terminated employee as evidence of notification. Verbal communication may be used, but it is highly recommended to back it up by ratification in writing through any of the means mentioned.

In practice, notary deed communications are used in certain conflictive cases and for employees in high positions to provide a more personal treatment to the termination process.

Prior notice periods have been established by law (NEL, section 231) as follows:

- 15 days' notice when the employee is in a trial period;
- one month's notice when the employee has worked for less than five years; and
- two months' notice when the employee has seniority that exceeds five years.

If the employer prefers not to give the prior notice, it must pay an amount equal to the corresponding period of prior notice (NEL, section 232).

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

In all cases that the employer is going to dismiss an employee, it must give proper notice or payment in lieu of notice, unless the exception established for fixed-term employees applies.

Severance pay

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

The NEL recognises the right to severance compensation due in cases of dismissals without cause, which includes the following.

- Seniority compensation: this compensation is equivalent to a monthly salary multiplied by years of service or a fraction over three months. Such basis has a maximum cap amount provided by the applicable collective bargaining agreement (three times the average of all wages provided by the agreement) and a minimum equal to one employee's gross monthly salary (NEL, section 245). The application of any cap amount to the seniority compensation may be challenged by the employee on grounds of disparity between the cap and the real salary. The Supreme Court established that the cap must not be less than 67 per cent of the best monthly regular salary of the dismissed employee to be constitutional.
- Severance in lieu of notice: the NEL provides that the employer must give prior written notice to the employee in the event of a wrongful termination of employment. The notice must be given by the employer within 15 days if the employment contract is under the trial period, and with one or two months' notice depending on the employee's seniority (less or more than five years). If the employer does not give prior notice, it must pay compensation in lieu of notice equivalent to the term of prior notice that applies to the particular case (NEL, section 232).
- Remaining days of the termination month: if the dismissal does not take place on the last day of the month, the employer must pay a compensation equivalent to those pending days to complete the entire month (NEL, section 233).
- Severance for proportional vacations: disregarding the cause of termination, the employee is entitled to compensation equivalent to the vacation pay in proportion to the days effectively worked (NEL, section 156).
- Semi-annual bonus: the employer must pay an annual bonus in two instalments (30 June and 18 December) equivalent to 50 per cent of the best monthly salary earned in the preceding six-month term. Whatever the cause of termination of employment, the employee is entitled to the proportional amount of the semi-annual bonus (Law No. 23,041).
- Statutory annual bonus over severance in lieu of notice: court decisions have ruled that the employee is also entitled to one-twelfth of the amount provided for severance in lieu of notice.
- Wages due and other benefits: the employer must pay any pending salary and any other benefits, incentives and compensation due to an employee.

The seniority compensation is reduced by 50 per cent if a reduction of business activity or lack of work objectively justifies the dismissal, and the procedure required by law is followed. The compensation is also limited to 50 per cent if the seniority payment is made as a result of the employee's death.

Within the framework of the current socio-economic scenario, on 13 December 2019, the president issued an urgent Decree No. 34/2019 (DNU). The DNU was published in a special supplement of the Official Gazette, and it declared a state of public emergency concerning the employment situation for 180 days, starting from the effective date of the DNU (13 December 2019).

The main points of the DNU in relation to the calculation of severance compensation are as follows.

- In the event of dismissal without cause notified to employees from 13 December 2019 until 10 June 2020 inclusive, the affected employee is entitled to receive double the corresponding severance compensation.
- The Decree is not retroactive; therefore, double compensation must not be paid for dismissals without cause notified before 13 December.
- The double severance compensation includes all compensation resulting from dismissal without cause, namely:
  - seniority compensation;
  - compensation in lieu of prior notice; and
  - compensation for the pending days of the termination month;
- Regarding the proportional compensation for pending days of vacations, there are two possible interpretations: a broader and more protective position considers that the 'compensation resulting from dismissal without cause' also covers proportional compensation for pending days of vacation; therefore, this concept must be duplicated as well. On the other hand, a more restrictive position considers that since the item 'compensation for pending days of vacations' is included in the severance compensation regardless of the cause of the termination of the employment relationship and is not proper and exclusive to dismissals without fair cause, it should not be included in the items that must be duplicated.

- The DNU establishes the application of the double severance compensation in the event of dismissal without fair cause, and it does not make distinctions regarding the modality of the employment contract.
- The provisions of the Decree could also apply when the employee considers him or herself to be constructively dismissed, owing to the fact that in the past, the labour judges understood that the double severance compensation established within the framework of an economic emergency situation should also apply to that kind of termination of the employment relationship.
- The text of the DNU does not establish anything regarding the duplication of fines for the lack or wrongful registration of the employment relationship. However, in the past, when double severance compensation was imposed, part of the judicial labour decisions applied the duplication to fines.
- The provisions of the DNU will not be applicable to employment agreements executed as of 14 December 2019.

Procedure

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

The requirement for a dismissal is proper notice or payment in lieu of notice. Prior approval from a government agency is not required by law.

Employee protections

43 | In what circumstances are employees protected from dismissal?

There are some employees that have special protection against dismissal:

- pregnant women within seven-and-a-half months before or after the expected date of birth; and
- employees that get married within three months before or six months after the marriage celebration.

The special protection is an assumption that any dismissal within the time period outlined under each circumstance was because of the contracted marriage or pregnancy. To avoid discriminatory dismissals, the law compels the employer to pay, along with the severance compensation, a full year of compensation.

Union representatives also have special protection by law. They may not be dismissed if there is no prior judicial resolution that removes the protection. If the employer violates this special protection, the union representative may claim the reinstatement in his or her position or the payment of the pending salaries until the expiration of this period, plus severance due on account of the dismissal without cause and an additional severance equivalent to one year's salary.

Furthermore, if an employer dismisses an employee on paid sick leave, it shall pay, in addition to severance compensation, the wages for all the time remaining to the expiry date of the licence or to the release date, as appropriate (NEL, section 213).

Mass terminations and collective dismissals

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

If collective dismissals are followed by payment of reduced severance compensation, the NEL authorises the employer to carry out collective dismissals in cases of force majeure, lack of work or reduction of work not attributable to the employer, provided it is duly justified (NEL, section 247). In those cases, dismissals must begin with the least senior staff within each specialty.

Regarding the staff hired in the same time period, dismissals must begin with whoever has fewer family responsibilities, although the order of seniority is altered.

The dismissed employee is entitled to receive compensation of one-half of the seniority compensation. However, if the company is willing to pay complete severance to terminated employees, the above-mentioned procedure is not applicable.

Depending on the percentage of affected workers, a special procedure (the crisis prevention procedure (PPC)) must be followed before the dismissals can be notified to employees. The PPC must be followed if:

- more than 15 per cent of the workforce is to be terminated in a company with up to 400 employees;
- 10 per cent of the workforce is to be terminated in a company with between 400 and 1,000 employees; and
- 5 per cent of the workforce is to be terminated in a company with more than 1,000 employees.

The Ministry of Labour and Social Security and the union representing the employees must be notified and take part in the proceedings. During the procedure, both parties are unable to pursue any actions, such as strikes, suspensions or dismissals.

Once the relevant labour authority has been notified of the PPC, it calls for negotiations between the union and the employer to discuss the collective dismissals and draft a social plan. The employer must file evidence of its financial situation before the labour authority and must also explain that the dismissals the company intends to make are reasonable, justified and proportional to its financial situation to save the company.

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 National Constitution allows class actions in section 43. However, in labour law cases, collective actions need to be filed by union representatives.

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?

To retire, employees must comply with the following requirements:

- reach the legally determined age of 65 for men and 60 for women (women have the option to continue working until age 65); and
- 30 years of contributions to the social security system.

However, the amendment introduced by Law No. 27,426 modifies the moment from which the employer can request the employee to initiate the retirement procedure. Before Law No. 27,426 entered into force, the employer could formally demand the employee to initiate the corresponding procedure provided that the employee complied with the requirements stated above. With the amendment, although both men and women are entitled to retire at 65 or 60 years old respectively, the employer is unable to request the employee to initiate the retirement proceedings until he or she is 70 years old and has made 30 years of contributions to the social security system. Thus, the employee may continue working until he or she is 70 years old. Only then will the employer be entitled to notify the employee that he or she must initiate the retirement proceedings and deliver the corresponding working certificates. Once the employee is notified of those circumstances, the employer must maintain the labour relationship until the employee obtains the pension benefit or for a maximum term of one year. Once

the pension benefit has been granted or the one-year term has expired, the employment contract will be terminated without any obligation for the employer to pay seniority severance compensation.

DISPUTE RESOLUTION

Arbitration

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

Local procedural rules applicable to the resolution of labour claims vary from province to province. For example, in the city of Buenos Aires, the exhaustion of a conciliation process before the Ministry of Labour and Social Security is a precondition to filing a complaint before a court of law. In this process, both parties must attend a conciliation stage to try to settle the claim (Mandatory Labour Conciliation Procedure, Law No. 24,635).

If the parties reach an agreement, it must receive the approval of the Ministry for the settlement to be valid. Once the agreement is approved, the parties have a legal certainty of 99 per cent that the agreement is valid, and it may be executable in the future if an employee brings a claim in this matter.

If the parties do not reach an agreement, the claimant will be entitled to file a judiciary claim to a court of law to resolve the issue.

Employee waiver of rights

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

The labour public order provisions establish minimum rights and rules governing labour relationships that cannot be waived by agreement of the parties. Terms of individual labour agreements that establish fewer rights or benefits than those established by applicable law or collective bargaining agreements will be void and automatically replaced by the more beneficial terms as established by law or collective bargaining agreements. Any modification must always be made to increase an employee's rights and not to reduce them.

Limitation period

49 | What are the limitation periods for bringing employment claims?

According to the National Employment Law, section 256, the limitation period for bringing employment claims is two years from the origin of the labour credit.

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?

Salary increase for private sector employees

Decree No. 14/2020, issued by the government and published in the Official Gazette on 4 January 2020, established salary increases applicable from January and February. The main aspects of the Decree are as follows:

1 From January 2020, a salary increase of 3,000 Argentine pesos applicable to employees of the private sector was established.
2 From February 2020, 1,000 Argentine pesos was added to the increase mentioned in (1).
3 The increase must be absorbed by future salary negotiations.
4 The increase should not be taken into account for the calculation of any additional salary provided in the collective bargaining agreement or the employment contract.
5 The increase must be recorded in the salary receipt as an independent item named 'supportive increase'.
6 Regarding employees that do not render services under a full-time employment contract, the salary increase will be paid proportionally.
7 Micro, small and medium companies that have a valid MiPyME certificate (issued by the Federal Administration of Public Revenues) are exempted from the payment of employer contributions in relation to the salary increase for three months or a shorter term if the increase is absorbed by future salary negotiations. If a micro, small or medium company does not have a MiPyME certificate, it had a period of 60 consecutive days from date of the publication of the decree to obtain the certificate.
8 The increase will not apply to employees in the public sector, employees in agriculture or the personnel of private houses.
9 The Ministry of Labour is empowered to issue complementary and explanatory regulations regarding the application of the salary increase.

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ISBN 978-1-83862-357-9