Labour & Employment 2021

Contributing editors
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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth 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 Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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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, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.

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Argentina

Mercedes Balado Bevilacqua and Cecilia Acosta

MBB Balado Bevilacqua Abogados

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 and guarantees to employees the following rights:

- limited workday,
- fair compensation,
- minimum wage (currently 21,600 Argentinian pesos),
- decent and equitable labour conditions,
- 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).

International treaties

Argentina is part of several international treaties that apply on employment matters; some of them have constitutional status and, thus, prevail over national laws.

Main statutes and regulations

National Employment Law No. 20,744 (NEL): labour relationships are mainly ruled by the 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 civil service (public sector employment), domestic and rural work, are excluded from the NEL and governed by special laws;

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

Law No. 24,013 regulates, inter alia:

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

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

- trial period applicable to indefinite employment contracts;
- prior notice;
- calculation of severance payments due to dismissal with no cause; and
- promotion of employment;

The Retirement and Pension Law No. 24,241 mainly determines:

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

Other laws

- 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;
- Collective Bargaining Agreement Law No. 14,250;
- Health and Safety Law No. 19,587; and
- Home-Office Regime – Law No. 25,777 (in force as of 1 April 2021).

Protected employee categories

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

Discrimination

Yes, provisions against discrimination in employment can be found in:

- The National Constitution (NC): it establishes in section No. 16 the principle of equality before law, which extends to salaries when stating 'equal compensation for equal tasks';
- international treaties with constitutional status, such as Convention on the Elimination of all Forms of Discrimination against Women and International Convention on the Elimination of all Forms of Racial Discrimination;
- International Labour Organization (ILO) Conventions, such as the Equal Compensation Convention (C100) and Discrimination (Employment and Occupation) Convention (C111);
- National Employment Law, sections 17, 70, 72, 73, 81, 172 and 187;
- Antidiscrimination Law No. 23,592;
- Trade Unions Law;
- Law No. 23,551, sections 7 and 53; and
- the Resolution No. 11-E/2018 issued by the Ministry of Labour and Social Security (MTEySS).

The categories regulated are the following:

- 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.
- The NC established the principle of equality before law, which extends to salaries when stating 'equal compensation for equal tasks'.
- Arbitrary discrimination (ie, where employers make distinctions on unreasonable grounds) is forbidden. However, employers are allowed to make distinctions as long as they are based on objective criteria, such as productivity.
- Amid infectious pandemics, such as the novel coronavirus (covid-19), employers should consider consulting with local counsel to help ensure that all workplace policies implemented to protect workers from infection are applied uniformly to all employees and job applicants regardless of their ethnicity, race or other protected categories.
- Religious discrimination is expressly forbidden in several local instruments, such as the NC, international treaties with constitutional status and laws. To avoid discriminatory acts based on religion, the employer must respect the religious holidays set as mandatory by the Ministry of Internal Affairs and excuse employees from work.
- Any act of discrimination based on the disability of a person is forbidden. In this sense, it is mandatory for public agencies, state companies and public enterprises that carry out public services to hire a minimum of 4 per cent disabled people over the total of their personnel. It is also mandatory to eliminate any architectural obstacle or barrier to achieve access for disabled people (ie, creation of ramps).

The exceptions permitted to the prohibitions against discrimination are those based on objective grounds, such as the principle of the common good, the principles related to greater efficiency, diligence or compliance with the duties by the employee.

Harassment

Prohibition against sexual harassment is statutorily regulated only in the public sector. As for the private sector, there was a bill whose aim was to punish violence and sexual harassment in the workplace, but it has been filed since the period for it to be discussed in parliament has expired.

In addition, Law No. 27,580, published in the Official Gazette on 15 December 2020, approved the Violence and Harassment Convention 2019 (No. 190) of the ILO, but this Convention will come into force in June 2021.

However, recent case law and doctrine have extended the scope of the employer's duty of safety, to include not only the obligation to take all measures necessary to protect employees' physical health but also those related to their mental and physiological health. In view of this, the employer has the obligation to provide a healthy workplace free of hostilities.

For that reason, if the employee suffers moral or sexual harassment in the workplace, and due to this situation damage is caused to his or her physiological health, a court of law will determine the employer's responsibility, unless the employer provides evidence of compliance with the duty of safety.

Enforcement agencies

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

The MTEySS 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.

Medical examinations

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

The employer may require medical examinations due to his or her power of control.

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.

The employer may refuse to hire an applicant who does not submit to a pre-employment examination because they are mandatory.

Drug and alcohol testing

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

The employer may require drug or alcohol testing due to his or her power of control. This power encompasses the employer's right to demand medical examinations provided that the methods of selection are automatic or at random, addressed to the entire personnel, and not on a discriminatory basis. Nevertheless, for such examinations to be valid, they must not violate the employee's dignity and must respect the right of privacy constitutionally granted (unless employee's 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, sexual orientation, disability or physical appearance.

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 (MTEySS) has 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 trans-persons over the total of their personnel (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 by collective bargaining agreements in individual cases.

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 (however, it is advisable to enter into written employment agreements to minimise the possible risks of misinterpretation). The existence of the employment relationship will be determined based on the facts and subordination of the employee.

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. For example, fixed-term employment agreements are an exception and may only be valid if they meet all of the following requirements: (1) the agreement must fix the term in writing; (2) the term cannot exceed five years; and (3) employers must justify the objective cause for this type of agreement in writing.

Regarding the home-office regime, Law No. 27,555 established the following: (1) The working day must be previously agreed in writing in the employment contract, according to the current legal standards. Therefore, the employment writing must be executed in writing; and (2) employees' consent is required when shifting from company's workplace to home office modality in writing, except for force majeure cases.

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

Fixed-term employment contracts cannot exceed five years. 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. 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 employee and would, thus, be considered as a violation of public order provisions. However, the probationary period may be waived by the parties in writing but the employer is not allowed to hire the same employee more than once using a probationary period.

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 depend on the applicant's nationality (ie, whether the applicant is a national of a member country of Mercosur).

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 21,600 Argentine pesos.

Resident labour market test

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

No, it is not necessary to conduct a labour market test.

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.

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 (the regulation establishes minimum rights that may not be waived by agreement of the parties).

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.

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?

If the employee has an accident or suffers an illness, he or she is entitled to a 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 National Employment Law, 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, an extraordinary 10-day-leave of absence (quarantine or isolation) must be granted for all employees arriving from overseas. If, considering the nature of the employee's duties, he or she is allowed to render services remotely, the employer can request him or her to do so. Otherwise, he or she is entitled to paid leave.

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:

- 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
- 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.
- 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.
- If an unfair dismissal occurs before the term agreed upon is finished, the employee is entitled to the corresponding 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.
- 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.
- 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.

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).

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
- 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.

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 their services.

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 225,171.69 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; and
- 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.

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 or an assignment of employees.

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.

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?

Since the covid-19 outbreak, terminations without cause (regular terminations), terminations based on lack or reduction of work, and suspensions due to force majeure or for lack or reduction of work are forbidden until the end of April 2021. The referred prohibitions will not be applied to employees hired after 13 December 2019.

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.

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.

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 where 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 applicable CBA) 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 (*Vizotti*'s case).
- 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.

Since the covid-19 outbreak, terminations without cause – regular terminations – terminations based on lack or reduction of work, and suspensions due to force majeure or for lack or reduction of work are forbidden until the end of April 2021.

Additionally, it is applicable the double severance compensation due to dismissals without fair cause and due to constructive dismissals. Duplication of severance includes all compensation items due by reason of dismissal without cause: (1) seniority compensation; (2) prior notice; and (3) pending days of the termination month. In addition, the amount corresponding to the duplication may not exceed, in any case, the amount of 500,000 pesos. Moreover, the double severance compensation will not be applicable to the employees hired as from 13 December 2019, nor to public sector employees.

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 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.
- 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 leave 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. 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 (CPP)) must be followed before the dismissals can be notified to employees. The CPP 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 CPP, 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.

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?

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?

During past year, in addition to covid-19 measures, the only modification in labour and employment regulation in Argentina was Law No. 27,555 that established the home-office regime. This Law came into force on 1 April 2021.

The main aspects of the Law are as follows.

- Home office modality consists of providing service or tasks, totally or in part, at an employee's home, or in a place other than the employer's establishment.
- The working day must be previously agreed in writing in the employment contract.
- Home office employees are entitled to the right to disconnect during time off and leave periods. Also, employers are not permitted to request employees to perform any tasks, or to send communications during time off.
- Employees living with, or taking care of, children under 13 years old, disabled people or elderly adults with special needs, duly evidenced, have the right to perform their tasks during compatible hours with their care duties or to interrupt their working day. Any act, conduct, decision, retaliation or obstruction made by the employer that violates this right will be considered discriminatory.
- The employees' consent is required when shifting from a company's workplace to home office modality in writing, except for force majeure cases.
- An employee's consent regarding home office modality may be withdrawn at any time, and the employer is obliged to assign employees tasks in the offices again. This right must be exercised according to the principles of good faith, non-abuse of rights, collaboration and solidarity.
- Employers must provide employees with equipment, working tools and necessary support for performing assigned duties, as well as afford all the installation, maintenance and repairing costs, or reimbursement of the expenses related to the use of the employee's own tools. If employees incur higher expenses related to the connectivity required to perform the tasks, those expenses must be reimbursed by employers, and they will not be considered remunerative.
- The provision of working tools is not considered remunerative and, therefore, they do not integrate the calculation base for any severance calculation or union or social security contributions.
- Employers must guarantee employees' training in the use of technologies by means of courses or support tools, and this training cannot constitute a greater workload than usual.
- Control systems intended to protect an employer's assets and information must involve union participation, aimed at protecting home office employees' privacy intimacy.
- In the case of international home office employees, the applicable law will be the one where the tasks are performed or the one corresponding to the employer's domicile, depending on which is more favourable to the employee.
- Companies implementing home office working must be registered, specifying the platform or software that will be used, as well as the payroll performing such tasks, and they must be informed before each registration or on a monthly basis.

Apart from this update, there are no other proposals to change the legislation.

Coronavirus

51 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 19 March 2020, through Urgent Decree No. 297/2020, the government established as a first measure, the Mandatory, Social and Preventive Isolation (the Isolation) for all the citizens of the Argentine Republic and

for all those staying temporarily in the territory. This measure is no longer in force, since the country is now under the Mandatory, Social and Preventive Distancing (the Distancing) measures, which allow for greater flexibility and mobility.

Therefore, as has happened in most countries around the world, employers had to introduce home office modality and adapt their business drastically. Within this sudden modification, the working world was shaken up. One of the main aspects that the pandemic triggered was the acceleration of digital development to adapt tasks to home office modality.

In this sense, considering that most people cannot attend their workplaces, it was noted that this new form of work has come to stay. Therefore, a Law establishing a Home Office Legal framework (Law No. 27,555) was passed.

In addition, certain measures were taken to protect individual's life and also to help companies, employers and employees:

- The following employees are exempted from the duty of attending to their workplace (unless they have been vaccinated), even if they perform essential activities: (1) people who are over 60 years old; (2) employees included in at risk groups; (3) pregnant employees; and (4) people who take care of their children at home;
- Companies must comply with the applicable protocol and must also guarantee hygiene and safety conditions established by the Health Ministry to preserve employees' health and well-being;
- Employees whose normal tasks may be carried out remotely (in isolation) must agree in good faith with their employer the conditions for performing their tasks from home. This provision may be only applied if the employee is neither infected by covid-19 nor has any symptoms.
- It was established the double severance compensation due to dismissals without fair cause and due to constructive dismissals. In this sense, duplication of severance includes all compensation items due by reason of dismissal without cause: (1) seniority compensation; (2) prior notice; and (3) pending days of the termination month. In addition, the amount corresponding to the duplication may not exceed, in any case, 500,000 pesos. Moreover, the double severance compensation will not be applicable to the employees hired as from 13 December 2019, nor to public sector employees.
- Terminations without cause (regular terminations), terminations based on a lack of or reduction in work, and suspensions due to force majeure or for lack of or a reduction in work are forbidden until the end of April 2021. The referred prohibitions will not be applied to employees hired after 13 December 2019. In addition, the only option available is suspension for economic causes (this aspect was also regulated).
- The Emergency Assistance Programme for Employment and Production was created by the Executive Power to help companies and employees that have been financially affected due to the current situation. However, this is no longer applicable.
- During the Isolation period, the government established an allowance with a non-compensatory nature for certain employees of the private sector. This is no longer applicable.

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