OPENING UP SHOP IN MEXICO

De La Vega & Martinez Rojas, S.C. is a member of L&E Global, the alliance of employment counsel worldwide

Employers dealing with operations in Mexico should be aware that labour relations are highly regulated in our country and that Mexican employees generally have greater rights than their non-Mexican counterparts.

De La Vega & Martinez Rojas, S.C. is a law firm integrated by a group of Mexican attorneys with wide professional experience, devoted to the provision of legal counselling on Labour and Employment matters. Our offices are headquartered in Mexico City with a net of correspondents in order to provide our customers specialized legal services throughout the country.

Our team has great practice in individual and collective issues, which enables us to offer our clients an innovative and integral perspective for both the prevention and solution of labour conflicts.

We also have close ties with institutions and labour authorities at the federal and local levels and are in permanent touch with international organizations, which allows to attain satisfactory outcomes and deliver pioneering solutions to our clients.

Below you will find a quick overview of the Mexican legal framework, which will allow your organization to evaluate the implications and requirements of conducting business in our country.

I. LABOUR AND EMPLOYMENT REQUIREMENTS

A. EMPLOYER POLICY REQUIREMENTS

The applicable legislations for Labour law in Mexico derive from the Constitutional provisions on social rights for workers in Article 123.

Article 123 of the Mexican Constitution provides protection for the collective interests of workers by establishing general employee rights that seek a balance in the employer-employee relationship; including but not limited to the following: (1) setting maximum limit of working hours per week; (2) equality rights; (3) weekly rest days; (4) mandatory rest days in the year (holidays or long weekends); (5) employees' right to profit sharing; (6) maternity leave; (7) limitations on work of minors; (8) limitations on work of pregnant and breastfeeding mothers; (9) paid vacation periods; (10) right to unionize, to strike and lockout, and right to collective bargaining; (11) minimum salaries; (12) limitations on work shifts; (13) overtime; (14) social security rights (such as the establishment of a housing fund for workers); (15) Christmas bonus; (16) mandatory training; (17) labour authorities (competence and jurisdiction); amongst others.

Furthermore, the following Mexican laws govern all labour relationships in Mexico, regardless of whether or not the workers are Mexican citizens:

- Federal Labour Law (FLL), 1970.
- Social Security Law, 1997.
- National Workers Housing Fund Institute's Law, 1972.

The FLL is the most important employment legislation in Mexico. It defines a labour relationship as the rendering of a subordinated personal service by one person to another, in exchange for a wage. The main element of any labour relationship is subordination,

which the Mexican Supreme Court has defined as the employer's legal right to control and direct the employee and the employee's duty to obey the employer. Once a labour relationship exists, the rights and obligations provided for by the FLL automatically enter into legal force; regardless of how the agreement is defined by the parties.

FLL entitles employees to the following minimum mandatory fringe benefits: (1) a year-end bonus equivalent to at least 15 days' wages, payable prior to December 20 of each year; (2) a yearly vacation period, the length of which depends on the employee's seniority; (3) a vacation premium of 25% of the salary payable to the employee during the vacation period; and (4) mandatory paid holidays on January 1, the first Monday of February to commemorate February 5, third Monday of March to commemorate the birth of Benito Juarez, May 1, September 16, third Monday of November to commemorate November 20, December 1 (every six years when a new President is elected), December 25, and any other holidays established by federal or state law.

Additionally, the Social Security Law is the legislation that contains the stipulations intended to provide further social benefits for the collectivity; specifically aimed for the employers and the employees. The Social Security Law covers the various rights and duties of both employee and employer with respect to retirement funds and healthcare benefits provided for by the authorities.

The National Workers Housing Fund Institute's Law was created with the purpose of providing support for the employees in order to acquire their own homes. A National Housing Fund was created for employees in order for them to have access to a government run mortgage (credit institution) and acquire their own homes. There is an obligation from the employer to deposit the corresponding portion of the employee's salary to the National Housing Fund in order for the employee to qualify for the mortgage option (amongst others).

B) EMPLOYEE TRAINING REQUIREMENTS

Among the labour and social security obligations that must be complied with in Mexico, every employer must integrate and formalize the collegiate organisms named "mixed committees" (composed by employer and employee representatives, which shall be incorporated in the work centres.

Of course, the Integration, registry and operation of the mixed committees is mandatory and is a matter of inspection by the federal and local labour authorities.

The mixed committees which mandatorily should be integrated are: (1) Health and Safety at the Workplace Mixed Committee; (2) Teaching, Training and Productivity Mixed Committee; (3) Mixed Committee for the Preparation of the Internal Work Regulations; (4) Mixed Committee for the Preparation of the General Seniority Chart; and (5) Mixed Committee to Determine the Workers' Share in the Company's Profit.

Teaching, Training and Productivity Mixed Committee

Pursuant to the FLL, every employer has the obligation to provide training to its employees and these are bound to take the training that may allow them to improve their life style, labour competence and productivity.

The Teaching, Training and Productivity Mixed Committee finds its legal basis on Section 153-E of the FLL, which establishes that it shall be incorporated in those companies having more than 50 employees.

When so agreed between the parties and considering the needs of the company due to the number of premises, its technological characteristics and the number of workers, more than one committee may be integrated, or mixed subcommittees may also be incorporated.

Integration: Teaching, Training and Productivity Mixed Committees must be integrated with the same number of employer and employee representatives, and the number of said representatives will be determined by mutual agreement between employer and employees or, as the case may be, by the employer and the union holding the Collective Bargaining Agreement.

Purpose: These mixed committees are the group responsible for monitoring, implementing, operating and improving the teaching and training systems and programs, as well as taking actions trending to increase productivity in each company.

Formalization: The committee should be incorporated through format DC-1 ("Report on the Incorporation of the Teaching, Training and Productivity Mixed Committee").

It is not necessary to file said format before the Ministry of Labour and Social Welfare, because together with the Teaching, Training and Productivity Plans and Programs (Format DC-2), as well as with the Skills Certificates (Format DC-3), they should be kept in the company's files and be shown to the labour authority when so required, in exercise of its faculties of inspection.

C) EMPLOYMENT AGREEMENTS

Written employment agreements in Mexico are mandatory. Every employee must enter into an individual employment agreement with the employer and set out the terms and conditions of the employment (in Mexico, there's no 'employment-at-will'). An employer must have justified cause (as defined by the FLL) in order to terminate the employment relationship, if not, employer must compensate the unjustly terminated employee accordingly (FLL stipulates the amount for severance payments). Notwithstanding the previous statement; in the given case that an employment relationship exists and there is no written agreement; the employee's constitutional and statutory rights are not waived or affected by this omission.

Article 24 of the FLL provides that working conditions must be established in writing, and each party must be provided with a copy of the employment agreement. According to Article 25 of the Federal Labour Law, an employment agreement must contain:
(1) the employee's and the employer's name, nationality, sex, civil status, Unique Population Registry Code ("CURP") and address;
(2) whether the employment agreement is executed for an indefinite term, for a specific job or term, for initial training and/or for season, and/or subject to a probationary period;
(3) a description of the services to be provided;
(4) the place or places where the work is to be performed;
(5) the length of the work shift;
(6) the salary and day and place of payment;
(7) that the employee will undergo training pursuant to the procedures and programs established by the employer as required by the Federal Labour Law, and
(8) other terms and conditions of employment, such as days off and vacations agreed upon by the employee and the employer.

The employer is responsible for the execution of the agreement. The fact that there is no signed employment agreement does not deprive the employee of his or her rights under the law.

In the case of Unions, there is an additional agreement that is negotiated and entered into by the Union and the employer in order to promote the creation or improvement of the labour conditions for the employees as a collectivity and in turn the employer obtains a loyal and solid workforce. The Collective Bargaining Agreement (CBA) is renewable and cannot contain provisions that stipulate the waiver of the basic constitutional and statutory rights or benefits for the employees as a collectivity. It can always be more favourable than the constitutional and statutory requirements but never less than the latter.

CBAs must also be in writing and contain the following information:
(1) names and domiciles of the parties executing the CBA;
(2) the address of the facilities where the CBA will be applicable;
(3) duration or whether it is for an indefinite term or specific job;
(4) work schedules;
(5) rest days and holidays;
(6) salary amounts;
(7) employee training;
(8) initial training for new hires;
(9) integration and operation of the Employee/Employer Committees as established by law;
(10) other conditions agreed upon by the parties.

CBAs must be filed in the Local or Federal Conciliation and Arbitration Board, depending on competence and jurisdiction. Competence and jurisdiction of the Conciliation and Arbitration Boards is determined by the employer's main business activities in accordance with the applicable FLL provisions.

II. CORPORATE LAW REQUIREMENTS

A) COMPLIANCE FOR INCORPORATION

Incorporation

The following steps are necessary for the incorporation of a company in Mexico:

Defining the corporate scope: Defining in a wide and detailed way the corporate scope of the company to be created.

Determining the corporate regime:

(1) Indicating the corporate regime with which it is intended to operate (S.A., S.A. de C.V., S.R.L. de C.V., etc.). Also, the way in which the company will be represented (Sole Administrator, Board of Directors, etc.);

(2) Appoint the company's tax domicile in Mexican territory;

(3) Obtaining the Powers granted by the company, the type of POAs and the persons to whom they will be granted must be mentioned; (4) In order for the POAs granted by the company through agreement of the Assembly or collegiate administration organism to take effect, will require notarizing the corresponding section of the minutes where their granting appears, duly signed by those who acted as President or Secretary.

Determination of patrimonial situation: At this point, you must have clear the shareholders or associates who will constitute the company, as well as the percentage of shares each of them will hold. (At least 2 shareholders are required)

Incorporation formalities: Pursuant to Section 5 of the Mexican Law of Commercial Companies, "the incorporation of companies must be notarized, as well as their amendments. The Notary Public shall not authorize the public deed or policy when the bylaws or their amendments contravene the provisions of this law."

According to Section 6 of the Mexican Law of Commercial Companies, the Incorporation Deed must contain the following:

(1) Names, nationality and domicile of the natural or legal persons who incorporate the company;
(2) The company's corporate scope;
(3) Its legal name;
(4) Duration, which may be indefinite;
(5) Amount of the capital stock;
(6) The expression of what each shareholder contributes in cash or other assets; the value attributed to these and the criteria followed for its enhancement. When the capital is variable, so will it be expressed indicating the minimum that is set;
(7) Domicile;
(8) The manner how the company will be administered and the power of the administrators;
(9) The appointment of administrators and the designation of those who will carry the social signature;
(10) How to make the distribution of profits and losses among the members of the society;
(11) The amount of the reserve fund;
(12) Cases where the society will be liquidated in advance, and
(13) The bases for the liquidation of the society and how to proceed to the election of the liquidators, when they have not been designated beforehand.

All requisites referred to in this Section and the other rules established in the public deed regarding their organization and operation will form the company's Bylaws.

Registration of every company, as well as obtaining the Taxpayer Registry Number (Tax ID or RFC) and the advanced electronic signature (e. firma) are performed before the Tax Administration Service (SAT).

It is important to mention that in order to conclude the incorporation of a company, it is mandatory that the General Assembly approves it, in order to continue with the notarization and registration of the Minutes of the Meeting of the Board and of the Bylaws (Section 101 of the Mexican Law of Mercantile Societies.

Section 15 of the Commercial Code provides that those companies legally incorporated abroad that establish in Mexico or having an agency or branch, may conduct business, subject to the special provisions of said

Code regarding the creation of their establishments in Mexican territory, their commercial operations and the jurisdiction of the Nation's courts.

The legal incorporation of foreign companies may be accredited with a certification indicating that they are authorized and incorporated according to the laws of the country where they were incorporated, pursuant to Section 17, Subsection I and Section 17 A, Subsection a) of Chapter Four of the Foreign Investments Law.

B) POST INCORPORATION REGISTRATIONS

- Company's registration before the Tax Administration Service (SAT);
- Company's registration as employer before the Mexican Institute of Social Security (IMSS);
- Employees' registration as the Company's employee before IMSS; and
- Registration of the Company before the local Treasury (i.e. Mexico City's Treasury).

III. PAYROLL AND BENEFITS PROVIDERS

The Mexican Federal Labour Law (FLL) contemplates different ways for the engagement of services:

I. Intermediation.

Pursuant to Article 12 of the FLL, intermediary is the natural or legal person who engages or intervenes in the engagement of another or others for the provision of services to an employer.

The intermediary is not employer of the employee(s) who render the personal, subordinated services and, in consequence, there is no joint liability. The beneficiary of the services is the only one directly responsible for complying with the obligations derived from the law and the services rendered.

On their side, employees will be entitled to (i) render their services under the same conditions and will have the same rights that correspond to the employees who perform similar services for the beneficiary company and (ii) intermediaries will not be able to receive compensation or commission with charge to the employees' salaries.

II. Alternatives for the Outsourcing of Services under FLL.

Performing independent tasks or services for a company. Pursuant to Article 15 of the FLL, it is possible to subcontract services not comprised in the beneficiary company's core business when the subcontractor is able to perform the services on an independent basis, has specialized personnel to perform such duties and sufficient resources of its own to comply with its labour obligations.

If the subcontractor does not have these elements, the beneficiary of the services will be jointly liable with the subcontractor for complying with labour obligations.

Subcontracting of specialized services. On December 1, 2012, a reform to the FLL became effective. New provisions include Article 15–A, which heightens the regulations on outsourcing with severe implications to many employers. Under the new FLL, "outsourcing" will be defined as follows: "The subcontracting (outsourcing) regime occurs when work is performed or services are rendered through workers hired by and working under a contractor's control, for the benefit of a customer, whether a legal or natural person, and the customer sets the tasks for the contractor and supervises the contractor in rendering the services or performing the contracted work. This type of work must comply with the following conditions:

(i) It cannot cover the totality of the activities, whether equal or similar in whole, undertaken at the work centre.

(ii) It is justified due to its specialized character.

(iii) It cannot include tasks equal or similar to the ones carried out by the customer's workers.

If any or all of these conditions are not met, the customer will be deemed to be the employer for purposes and effects under the Law, including as it applies to obligations related to social security."

The FLL also establishes new requirements, including that the contract must be in writing and that the customer (or beneficiary of the services) shall ensure that the contractor complies with its obligations under the labour law. It further provides that the subcontracting regime will not allow the transfer of workers from a customer to a contractor, for purposes of undermining any right under the FLL.

The wording of these regulations is ambiguous. Many of these conditions are difficult to determine and impractical in their application. Furthermore, in practice, the proposed outsourcing regulations substantially impact employers, since many of them have a corporate structure depending on service companies to provide specialized functions. In addition, the cost of business also increases for many business groups that have outsourced their entire workforce through service companies, when considering the company's profit-sharing obligations for an entire group of workers, as opposed to only for those that the company directly employs.

We are pleased to offer our services for all of the required work identified above and assist your organization to open in Mexico. Any portion of the work can be conducted on the basis of a blended rate of US $300.00 per hour in addition to any required disbursements and tax. As an alternative, we can offer a project budget, based on our previous analysis of the matter, plus disbursements and tax.

If you have any questions, please contact

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We look forward to working with you.