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EMPLOYMENT LAW OVERVIEW

CHILE 2021-2022

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I. GENERAL OVERVIEW

1. INTRODUCTION

The Chilean Labour Statute contains several minimum rights granted to employees that must be honored by employers. Those minimums cannot be waived by employees. The most relevant minimum labour rights are: minimum legal wage (currently approx. US$425); 15 working days' vacation per year; profit sharing; maximum 45 hours of work per week; severance; and social security contributions.

2. KEY POINTS

- Chile's labour laws are established as a general system to protect employees.
- Terminations in Chile -both for cause and without cause- must be duly grounded in writing.
- Labour Courts normally rule looking for employees´ protection.
- Labour Courts ponder the evidences according to the "rule of reason".

3. LEGAL FRAMEWORK

The Chilean Labour Statute is basically composed of the Labour Code and several special social security laws.

4. NEW DEVELOPMENTS

In the year 2020, for the first time, the Labour Code was amended to regulate, in full, remote work. As a general rule, in Chile an employer cannot terminate a labour contract at will. Employers must ground terminations on a company-related business need. Recently, courts have become more and more strict when considering if the invoked business grounds are enough to justify a termination.

II. HIRING PRACTICES

1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

The law states that regarding companies with 25 or more employees hired, at least 85% of them must be Chilean citizens. To determine this ratio, the law excludes technicians. For these purposes the law deems the following persons as Chileans: (i) foreigners whose spouse or civil partner or whose children are Chilean, including widows or widowers of a Chilean spouse; and (ii) foreigners who have resided in the country for more than five years, not considering accidental absences.

2. TAXES

A. NATIONAL EMPLOYEES

Remunerations of employees are subject to a monthly Second Category Income tax, under a progressive tax scale to be deducted at source by the employer. This tax is payable by the company to the Treasury within the first 12 days of the month following that of the deduction. Currently, the tax brackets range from exemption to a 40% tax rate.

B. FOREIGN EMPLOYEES

Foreign employees rendering services in Chile and also domiciled or residing in Chile are likewise subject to the Second Category tax as explained above.

As a general rule, foreigners neither domiciled nor residing in Chile and working in Chile are subject to a flat 35% Additional Income tax to be deducted by the company that employs them in Chile upon payment of the salary or fee, and the tax is payable to the Treasury within the first 12 days of the month following that in which the tax was deducted. However, the rate for said additional tax shall be 20% in case the foreign employee with no residence or domicile in Chile receives remunerations from a Chilean source, originating in the provision of scientific, cultural or sports services. Likewise, the tax rate shall be 15% if such employee is remunerated by a Chilean source, originating from the provision of services deemed to be professional or technical.

The tax law does not contain a definition of domicile, and in the absence of such definition the general provisions of the Civil Code apply. Under these provisions, domicile is acquired whenever sufficient evidence exists that the foreigner is coming to live in Chile for a reasonable period of time, i.e. if he is hired under a labour contract for one year or more, assumes an executive position in the company, brings his family, etc.

In the case of residence, the Tax Code does provide a definition, indicating that residence is acquired when the foreigner stays in Chile for more than 183 days, continuously or not, in any period of 12 months. In the case of foreigners, during their first three years of residence in Chile they must pay taxes as indicated above only on their Chilean source income and this three-year term may be extended by the tax authorities. After the three-year term or its extension is over, the foreigner must pay taxes on worldwide income.

3. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

Foreign employers do not need to establish a local hiring entity. However, when services are rendered in Chile to a foreign employer under labour subordination, the latter must designate a

representative in Chile (typically a payroll provider) to sign a local employment contract on its behalf, as well as to pay salaries and social security contributions.

4. LIMITATIONS ON BACKGROUND CHECKS

In Chile, employers are not allowed to condition a hiring on economic records (exceptions apply) and cannot request pregnancy certificates nor HIV checks.

5. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

No one can be discriminated against. Distinctions and preferences are forbidden if based on: race, color, gender, maternity, religion, politic opinion, language, social origin, nationality, gender identity, sexual orientation, or union affiliation. An application cannot be rejected because of any of the above conditions.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

Chilean legislation provides three categories of labour contracts: individual labour contracts, collective labour contracts and special contracts.

2. INDIVIDUAL LABOUR CONTRACT

This is a written contract between an employer and an employee whereby they are mutually bound, the employee to render personal services under ties of dependence and subordination to the former, whereas the employer to pay compensation for those services.

Article 10 of the Labour Code states the minimum provisions that must be included in the individual labour contract, such as date and place of the contract, the identity of the parties, the position of the employee and job description, the place of work, the remuneration to be paid by the employer, the terms of payment (at maximum 1-month intervals), workday, the duration of employment and the benefits in cash or in kind to be provided by the employer.

3. COLLECTIVE LABOUR AGREEMENTS

Collective labour agreements are contracts executed between employers and employees with the purpose of establishing common labour conditions, remunerations or other benefits in kind or money, for a fixed period of time. The collective contract must be agreed in writing and must be registered before the Department of Labour within 5 days from its execution. Legally, such contracts must be executed for a fixed-term, which cannot surpass 3 years and may not be less than 2 years. Also, the law provides the minimum clauses to be included in these instruments.

The Labour Code also allows for the possibility that the employer and one or more unions, may freely negotiate a collective agreement, without being subjected to the judgment of a legal proceeding, which is also considered a labour collective instrument.

4. SPECIAL LABOUR CONTRACTS

The law also provides for several other special labour contracts. Each of these contracts have their own characteristics and specifications, e.g. the apprenticeship contract which is restricted to individuals under 21 years of age; farm employees' contracts; contracts for employees on ships or at sea and temporary dock employees, and contracts for domestic help.

5. SUBCONTRACTOR/ TEMPORARY EMPLOYEES

In Chile it is common that large companies subcontract companies to perform specific tasks or render special services such as security and cleaning services, catering, etc. Chilean law provides that if the contractor breaches legal or contractual obligations towards his employees, the main company (usually called client) can be jointly-liable or bear subsidiary liability. This liability is extended to labour and social security obligations, therefore during the term of these contracts the principal must permanently verify that contractors

comply with their obligations unto their employees. Temporary employees supply is permitted only for exceptional circumstances provided by law and for a limited time period.

6. FIXED-TERM/OPEN-ENDED CONTRACTS

The parties may either agree on an indefinite contract or places limits on terms (to the completion of a particular job to be performed by the employee, or else agree on a fixed period of time). In this last case, the contract's term cannot exceed one year, or two years in the case of managers, professionals and technicians. However, local law allows term extension (which cannot surpass the overall time previously mentioned). If the employee continues rendering services for the same employer after the contract term's expiration, it will automatically become indefinite.

It is also important to consider that in November 2018, certain changes were introduced to contracts for a special job task. Under such agreements, the employee undertakes to execute a specific and determined job or work (either material or intellectual). Therefore its validity is limited to the work itself. The new scheme provides that different tasks or stages of a specific work may not be individually considered as two different successive contracts for it will be legally presumed as indefinite. Also, any contract engaging permanent services will not be deemed as a contract for a specific job. Lastly, these employees are entitled to vacation and a special kind of termination severance if certain requirements are fulfilled.

7. TRIAL PERIOD

A labour trial before the courts can last, ordinarily, between 8 months to 2 years.

8. NOTICE PERIOD

To terminate an employment contract for cause, the employer can produce an immediate termination, without notice requirements. Other terminations require 30 days' notice. Immediate terminations are allowed as well, if paying a severance in lieu of notice (1 month capped remuneration).

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

Employers have a general duty as follows: to have in place all necessary tools and conditions to efficiently protect the life and health of all employees rendering services in its facilities, as well as to avoid labour accidents or diseases. Employers must inform their employees of the possible risks that they could face at the workplace.

2. SALARY

The law considers as remuneration the cash payments and cash-equivalent benefits in kind that the employee receives from the employer on account of the employment agreement. The remuneration includes base salary, overtime payment, commissions, profit sharing and bonuses. The law further indicates that certain payments or allowances do not constitute remuneration, such as lunch, family allowance for each charge of the employee, transportation allowance, etc. The remuneration must be paid in the agreed fixed period, which cannot exceed one month. However, in the case of variable remunerations, this variable remuneration or commission is usually paid monthly, bimonthly or quarterly. Other payments which depend on the quarterly or yearly results of the company, i.e. bonuses and profit sharing, are paid at the end of the quarter or business year, respectively.

The amount of remuneration can be freely agreed between the employer and the employee. However, the law sets a minimum level, which in the case of the monthly base salary for employees working 45-hour weekly cannot be lower than one legal monthly minimum wage (CL$326,500; US$425 approximately), as from 1 September 2020.

3. PROFIT SHARING

Under the provisions of the Chilean Labour Code, if a company earns profits, it must share part of them with its personnel. The law stipulates that companies must distribute 30% of net profit to the employees, calculated in proportion to the employee's salary. The basis used to determine profits is the corporate taxable income (subject to certain adjustments) less 10% of net equity. However and in lieu of the above obligation, the employer may pay a bonus of 25% of the yearly salary, but the bonus in this case, regardless of the level of salary of the employee, cannot exceed 4.75 monthly minimum wages (at present app. CL$1.550.875; US$2,015). The company and the employees may agree on a profit-sharing system different from those described above, provided the payment to the employee is not lower than the two alternatives mentioned above.

4. MAXIMUM WORKING WEEK

The normal workweek is limited to a maximum of 45 hours. This maximum must be worked in no less than five and no more than six consecutive days. The normal workday shall not exceed 10 hours. The workday must be divided into two periods, leaving between them at least a half-hour break for lunch, which must not be considered for the purposes of determining the workday. The law also indicates some cases in which the rest period is longer, i.e. restaurants, hotels and club employees. Working hour limits do not apply to employees who work for different employers; to managers or administrators, or to employees who work without immediate superior supervision or outside the working premises, factory, etc. Said limits do not apply to employees who are hired to work outside

the office using telecommunication or computing media; nor do they apply to employees whose activities are not of a steady nature or require only their presence. There is also an exception regarding stores or commercial establishments which, in days immediately prior to Christmas or national holidays, may extend the workday by two hours. In these cases, the hours in excess of the 45-hour maximum will be paid as overtime.

5. PART-TIME WORK WEEK

The Labour Code regulates a special contract known as a "part-time" contract. The part-time week duration cannot exceed 30 hours per week. According to Chilean law, part-time jobs are subject to the same provisions applicable to regular jobs, with the following exceptions: i) the maximum profit-sharing payment can be reduced in accordance with the number of hours worked, and ii) the parties are able to agree on different alternatives for workweek distribution, thus allowing the employer to choose between said alternatives and select the one that will be used during the following week or period.

6. OVERTIME

Overtime, which is defined as the time worked by the employee in excess of the legal or agreed workday, if shorter - shall be agreed only to take care of necessities or temporary situations of the company, which include all circumstances that, while not permanent in the company's productive activity and deriving from occasional events or from unavoidable factors, imply a greater work demand in a certain amount of time (but not more than 2 overtime hours per day). Overtime work agreements shall be evidenced in writing and be temporarily effective over a period not exceeding three months, renewable by agreement of the parties. However, the permanence of the circumstances that originated them, which by no means shall affect the occasional character of the overtime work, will determine the limit for its renewals. Overtime must be paid with a 50% surcharge.

7. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Employees' Compensation Insurance Law established under Law Nr. 16,744 states the obligation for companies or establishments with more than 25 employees to create a Permanent Safety, Hygiene and Risk Prevention Committee (Comité Paritario), comprising representatives of both employers and employees. This committee is responsible for the adoption of all measures necessary to avoid work-related accidents and for recommending the proper use of the safety gear available. None of the employees' representatives in this committee can be dismissed while sitting on the committee, without prior authorisation of the labour courts.

B. COMPLAINT PROCEDURES

Employees are allowed to file a claim internally, following the Internal Work Rules, or before the courts when suffering a labour accident or professional disease that could imply an employer´s responsibility.

C. PROTECTION FROM RETALIATION

The Labour Code contains specific rules and sanctions against retaliation: labour fines; additional severance; and even allows for an affected employee to choose between severance or reinstatement at work, if he/she was terminated under serious discriminatory circumstances.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

The Constitution prohibits any form of discrimination and states that all persons are equal before the law.

2. EXTENT OF PROTECTION

The Labour Code strictly prohibits acts of discrimination, including distinctions, exclusions or preferences based on race or ethnicity, nationality, socioeconomic status, language, political ideology or opinion, religion or beliefs, union membership or participation in union organisations, sexual orientation, gender identity, marital status, age, affiliation, personal appearance and illness or disability, which have the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation. However, distinctions, exclusions or preferences based on the qualifications required for a particular job are not considered acts of discrimination. Article 194 of the Labour Code prohibits discrimination on the basis of pregnancy. Another law prohibits discrimination on the basis of HIV/AIDS. The law on the Protection of Breastfeeding (No. 21.155) amends the Labour Code to include maternity, breastfeeding and the act of extracting breast milk (lactation) amongst the prohibited grounds of employment discrimination.

3. PROTECTIONS AGAINST HARASSMENT

The internal regulations of the company must contemplate the obligations and prohibitions to which the employees are subject, and must include (within this section) a rule that prohibits employees of the company from improperly exercising or imposing, by any means, demands or ultimatums of a sexual nature upon a person, without their consent, that threaten or harm his/her employment situation or job opportunities; such conduct will, for all related purposes, constitute sexual harassment or harassment at work.

Moreover, the company's internal regulations must further contemplate a procedure to report such conduct, along with the protective measures and sanctions that will be applied in the event of a harassment complaint. Likewise, it must establish the mechanisms to report an act that constitutes harassment at work, which includes, specifically: any conduct that constitutes aggression or harassment, exercised by the employer or by one or more employees against another (or others), by any means, and which results in impairment, mistreatment or humiliation, or threatens or harms the affected person's (or persons) employment situation or job opportunities, provided that all such behavior is practiced repeatedly.

A victim of sexual or work harassment must submit his/her complaint in writing to the management of the company, establishment or service provider where he/she works or to the respective Labour Inspectorate. The employer may choose to make an internal investigation directly or, within 5 days of receiving the complaint, refer it to the Labour Inspectorate, which has 30 days to carry out the investigation. The internal investigation conducted by the employer must be carried out within 30 days. Once the investigation is completed, the results must be sent to the Labour Inspectorate. If the complaint is made by the affected party -male or female- or referred by the employer to the Labour Inspectorate, the latter will carry out an investigation under the same terms/guidelines described above. Once the investigation has been completed, the

Labour Inspectorate will communicate the results to the employer and, if the existence of sexual and/or work harassment has been proven, will suggest concrete measures to be taken.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

The law on the Inclusion of Persons with Disabilities in the world of work, requires that public and private institutions employing 100 or more employees must dedicate 1% of their workforce to persons with disabilities. As of 1 April 2019, companies with 100 or more employees must comply with Law No. 21,015, which encourages the labour inclusion of persons with disabilities. This hiring quota can be met directly, by hiring people with disabilities or those assigned a disability pension, or through one of the alternative compliance modalities provided by the law.

Main obligations established by law include the following:

- Obligation to hire: companies with 100 or more employees must hire or continue to employ, as the case may be, at least 1% of persons with disabilities or those who are assigned a disability pension from any social security system, in relation to the total number of their employees.
- Obligation to register contracts: on the Labour Department's website, the employer must electronically register the employment contracts of persons with disabilities or those assigned a disability pension, as well as the modifications and terms of these contracts. Companies are required to complete this registry within 15 working days, counted from the date of hiring.
- Obligation to communicate electronically: during the month of January of each year, companies with 100 or more employees must proceed to communicate electronically via the Labour Department's website, which they inform as to: (i) the number of employees hired in each month; (ii) the number of hired employees with a disability or assigned a disability pension for each month; and (iii) the effectiveness of having complied with the law directly or through alternative measures as established by the law itself.

Alternative compliance modalities:

- entering into contracts for the provision of services with companies that have hired people with disabilities.
- make monetary donations to projects or programs of associations, corporations or foundations referred to in Article 2 of Law No. 19.885.

As of 1 April 2020, companies may only use alternative measures insofar as they have good reason to do so. Only reasons derived from the nature of the functions performed by the company, or the lack of persons interested in the offers of employment, will be considered as well-founded reasons for the application of alternative measures.

Due to the new provisions of Law 21.015 on Labour Inclusion, the company is required to make the necessary adjustments to adapt the mechanisms, procedures and practices of selection in all pertinent matters that are required to safeguard equal opportunities for people with disabilities who participate.

In terms of accessibility regulations involving a company, a distinction must be made between public and private spaces. Until now, the duty to incorporate accessibility standards in spaces "of public use" or "attention to the public" is the only obligation under the law.

Industrial establishments (e.g., where industrial products are manufactured) should consider spaces and facilities for people with disabilities only in case of public attention, if the project considers it.

5. REMEDIES

An employee, who is directly affected, or the union may denounce the violation of a fundamental right, such as sexual indemnity or non-discrimination, before the courts or the Department of Labour. In addition, the Labour Inspectorate must file a complaint before the competent court when it becomes aware of a violation of fundamental rights.

Non-Discrimination Law No. 20. 609 ("Ley Zamudio"): The fundamental objective of this law

(known as the 'Zamudio Law') is to establish a judicial mechanism to effectively restore the rule of law, when an act of arbitrary discrimination is committed. Not every distinction or restriction has an arbitrary character. For the application of this law, arbitrary discrimination is understood as any distinction, exclusion or restriction that lacks reasonable justification, made by agents of the State or individuals, and which causes deprives, disturbs, or threatens the legitimate exercise of fundamental rights as established in the Political Constitution of the Republic or by international treaties on human rights, which have been ratified by Chile and are in force. The Zamudio Law creates an action for arbitrary non-discrimination, which may be filed by those directly affected by an action or omission that amounts to arbitrary discrimination before the judge of letters of their domicile, or before the judge of the domicile of the person responsible for such action or omission.

6. OTHER REQUIREMENTS

- companies with 100 or more employees must hire or continue to employ, as the case may be, at least 1% of persons with disabilities or those who are assigned a disability pension from any social security system, in relation to the total number of their employees.
- at least 85% of the employees serving the same employer shall be Chilean nationals. In other words, the percentage of foreign employees allowed per company is 15%. An exception to this provision applies to an employers who does not employ more than 25 employees.
- initiate internal adjustments to be implemented in the company to promote both the inclusion of people with disabilities and a culture of diversity within the company. The inclusion, exclusion or vulnerability of any group in a minority situation, means the implementation of all the necessary processes involved in the management of people.

For the above, it is necessary to explicitly state the prohibitions and sanctions for discrimination, between various aspects/reasons for disability, according to the Zamudio Law, which establishes measures against discrimination in the Code of Ethics or Good Practices and Conduct.

VI. PAY EQUITY LAWS

1. EXTENT OF PROTECTION

Enacted in 2009, the Equal Pay Law (No. 20.348) establishes that companies shall comply with the principle of equal remuneration between men and women performing the same work, and objective differences in remuneration based on, among other reasons, capabilities, qualifications, suitability, responsibility or productivity, shall not be considered arbitrary. The principle of equal remuneration between men and women performing the same work or the same job is neither recognised nor respected when involving acts that imply a substantial difference in the remuneration of the personnel, adopted on the basis of the sex of the worker, such as: lower salaries for women performing the same work as male employees and lower values in the bonuses, incentives, deals or commissions that are agreed upon. Notwithstanding the above, and in accordance with the provisions of current legislation, differentiated remuneration may be agreed upon between one or more employees, in the event that any of the following situations arise:

- differences in the individual capacities of the employees;
- differences in the qualifications or objective evaluations of the personnel taken or performed by the company, based on, among other aspects, the fulfillment of objectives, the employee's productivity, attendance and punctuality;
- suitability for the position (e.g., those individuals who meet the necessary or optimal conditions for a given function or work);
- different levels of responsibility within the company's organisation, which will be expressly stated in the respective employment contracts;
- difference in the employee's productivity.

2. REMEDIES

Any employee who considers that he/she has been or continues to be affected by events that threaten the equality of remuneration between men and women, has the right to petition, in writing, the head office, or the management, or the respective personnel unit directly, demanding equal remuneration (in accordance with Art. 62 bis of the Labour Code and Art. 1 No. 1 Law No. 20.348).

3. ENFORCEMENT/ LITIGATION

In the event that wage discrimination is verified, not only will it result in a fine from the administrative authority, but also the judge presiding over the court proceedings will be able to take all measures necessary to correct any such irregularities. In reality and with respect to the procedure of the complaint, if the employee seeks relief from the Labour Department, an attorney will take over the case and pursue mediation. If this course of action fails to achieve a result, the case for labour protection will pass to the Labour Courts. Additionally, the employee is entitled to go directly to court.

4. OTHER REQUIREMENTS

Employers are obliged to include in their internal regulations of order, hygiene and security the provisions and rights set forth in the Equal Pay Law, also adding, in detail, a channel of complaint (within the same company) for employees' claims in the event that such a wage gap is determined to be discriminatory in nature.

VII. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

There is no regulation in Chilean labour legislation that regulates the use of new technologies, much less social networks (e.g., Facebook, Twitter, Instagram or other platforms). Employers can nevertheless, regulate the use of technological tools provided for labour purposes.

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Employers can include a provision in the Internal Work Rules, wherein any email sent by an employee within the framework of the employment relationship and through company-devices, will be automatically copied to a supervisor or to a server. However, the private communications of employees must be respected.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Employees using social media to divulge confidential information can be terminated for cause. Any particular situation must be considered on a case-by case-basis.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

The Labour Code establishes provisions regarding the termination of the labour contract and employment stability. Accordingly, the labour contract may only be terminated by agreement of both employer and employee, by the employee's resignation, by the death of the employee, by the expiry of the fixed-term agreed upon in the contract, by the completion of the work for which the employee was hired, by an act of God or circumstances beyond the control of the parties (force majeure) and upon dismissal by the employer. As a general rule, in Chile an employer cannot terminate a labour contract at will. Employers must ground terminations on a company-related business need. Recently, courts have become more and more strict when considering if the invoked business grounds are enough to justify a termination.

2. COLLECTIVE DISMISSALS

Currently, the Labour Code does not contemplate a procedure to regulate the collective dismissal of employees.

3. INDIVIDUAL DISMISSALS

Terminations for cause:

- serious misconduct by the employee, such as lack of probity, sexual harassment, physical abuse against the employer or another employee, injury to the employer, immoral conduct affecting the company and harassment at work;
- carrying out activities prohibited in the work contract;
- failure of the employee to appear at work without justified cause on two consecutive days, two Mondays in the month or a total of three days in the month; likewise, unjustified absence, or without prior notice on the part of the employee who is in charge of an activity, task or machine, the abandonment or stoppage of which would cause a serious disruption in the progress of the work;
- abandonment of work, understood as: a) the unjustified departure of the employee from the site of the work and during the working hours, without the permission of the employer or the person representing him and b) the refusal to perform, without a justified cause, the tasks agreed upon in the contract;
- acts, omissions or recklessness that affect the safety or operation of the establishment, the safety or activity of the employees, or their health;
- material damage caused intentionally to the installations, machinery, tools, work tools, products or merchandise; and
- serious breach of the obligations imposed by the contract.

Terminations grounded on business needs:

- needs of the company, establishment or service;
- written eviction of the employer;
- in the event the employer has been subjected, through a judicial resolution, to a bankruptcy proceeding for the liquidation of its assets.

4. SEVERANCE PAY

A. IS SEVERANCE PAY REQUIRED?

If the employer dismisses the employee based on the general grounds of "company/business needs" such as changes in economic conditions, downsising of the company, or in case of termination at will (when permitted by law), the following severance compensation will be awarded to the employee:

- severance compensation for years of services: amounting to one month's remuneration for each year or fraction thereof in excess of six months spent in the service of the same employer, with a limit of 330 days' worth of remuneration. However, for the purposes of calculating this severance compensation, the law stipulates that the basic monthly remuneration cannot exceed a maximum of 90 "Unidades de Fomento" (approximately US$3,435), although this capped amount may be waived by the parties;
- if the dismissal notice is not given 30 days in advance, the employee will be entitled to receive a severance compensation equivalent to one month's remuneration (same cap as above applies). If the employer does not pay the above severance to the employee, certain increases may apply, up to 150%.

Nevertheless, if the employee is dismissed for cause, i.e. serious breach of contract by the employee, material misconduct, etc., no right to severance compensation arises for the employee. However, the employee may contest the dismissal before the Labour Courts and if the courts rule in favor of the employee, the company will be obliged to pay the severance indicated above plus an additional penalty of up to 100% of the above-calculated severance compensation, depending on the termination cause invoked.

According to article 162, paragraph 5 of the Labour Code, if, at the time of dismissal, the social security contributions are not duly paid, the dismissal will not result in terminating the labour contract. Consequently, the employer could be forced to pay the remuneration and other payments established in the labour contract to the employee, until these social security contributions are ultimately duly paid.

5. SEPARATION AGREEMENTS

Labour release settlement agreements must be made available to the employee within 10 working days after separation.

A. IS A SETTLEMENT AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

A settlement agreement is mandatory in Chile. This must be granted and made available to the employee within 10 working days of the employee's separation. Only if the parties agree, would it be possible for the payment to be issued in installments. However, this rule also establishes that the parties are not required to subscribe to, or even sign, the settlement agreement in the case of contracts of a duration of no more than 30 days, unless they are extended for more than 30 days or upon expiration of this maximum period, the employee continues to provide services to the employer with the employer's knowledge.

B. WHAT ARE THE STANDARD PROVISIONS OF A SETTLEMENT AGREEMENT?

The termination of the employment contract must contain at least:

- the legal ground of the employment relationship.
- the amount, if any, to be paid for severance pay (substitute for notice, proportional vacation and severance pay, if applicable) and other amounts that the employer must pay to the employee so that nothing is owed;
- a release provision.

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

As a general rule, no it does not. In the case of the termination of a minor allowed to work, it must be ratified by both the minor and the person who, in accordance with the law, gave him/her permission to work.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

A settlement can contain everything that the parties want to agree upon, as long as the legal minimums are met. It may be agreed that, in the event that one of the provisions or clauses is inapplicable, it

may be established that these will not render the remaining conditions of termination or settlement ineffective.

6. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The employee may choose not to agree to the terms of the settlement. If this is the case, he shall not sign the agreement, and in the same document together with his signature, he may make a "reservation of rights" in writing, indicating the non-payment of remunerations or benefits, or because of the existence of discrepancies in the amounts thereof.

If the employee does not sign, the corresponding lawsuit(s) may be filed in due time. Generally, it will be 60 working days to challenge the termination cause, with a suspension of the term while the claim lasts before the Labour Inspectorate, with a maximum limit of 90 days. The judicial working day counts as Saturdays, that is, it only counts as holidays and Sundays.

If an employee challenges the cause of termination before the courts, severance can be increased from 30% to 100% depending on the invoked cause. Likewise, if a court establishes that a termination was discriminatory or intended to affect unionisation rights, additional compensation can be applied, from 6 to 11 monthly remunerations and, in some serious cases, employees can choose to be reinstated at work.

7. WHISTLEBLOWER LAWS

In Chile, the legislation for the protection of whistleblowers is very restricted in contrast to the advanced regulations on the subject in comparative law. In addition, it does not include forms of reparation or compensation to the complainant for the reprisals suffered, or other protections unrelated to the protection of his/her labour situation.

Only Law No. 20.393 of 2009 establishing the criminal liability of legal entities for the crimes of money laundering, financing of terrorism and bribery are certain companies required to introduce procedures, albeit that are restricted to these areas. In the commission of any such crimes, the employer may be liable for the criminal acts committed by employees and dependents within the scope of their duties.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

Any type of agreement in an employment contract or obligation that either restricts the employee from taking some action or which requires the employee to abstain from a specific action, falls under the definition of a restrictive covenant.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

It is permissible to include non-compete clauses in the employment agreement, during the labour relationship. A breach can lead to termination for cause.

B. NON-SOLICITATION OF CUSTOMERS

This type of clause can be included as a non-compete prohibition during the labour relationship.

C. NON-SOLICITATION OF EMPLOYEES

This type of clause can be included as a non-compete prohibition during the labour relationship.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

In Chile, there are no labour rules expressly regulating restrictive covenants or prohibiting them. However, the Chilean Constitution explicitly protects the employee's freedom to work and the right to free choice.

Notwithstanding the above, non-compete clauses after labour termination have been accepted as valid when they are provided for in writing; a form of compensation is paid to the employee; and their duration is reasonable. In practice however, enforceability is difficult.

4. USE AND LIMITATIONS OF GARDEN LEAVE

An employee who is leaving a job, having resigned or otherwise had his employment terminated, is instructed to stay away from work during the notice period, while remaining on the payroll. Garden leave is not regulated in Chile. As a result, the parties could agree to such a scenario, but the employer however, cannot unilaterally impose it.

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The Chilean Labour Code states that total or partial modifications relating to ownership and possession (actual, constructive or mere possession) of the company, will not affect the rights and obligations of employees arising from their individual contracts or collective agreements, which will maintain their continuity with the new employer. This so-called "legal continuity principle" must be considered on a case-by-case basis.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

No special requirements are necessary if the legal continuity principle applies.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The Chilean Constitution establishes the freedom of association and unionisation for everyone, which is why, in Chile, collective relations of employees are organised into unions; defined as any grouping of employees, more or less permanent, with a purpose of defending their collective professional interests.

In general terms, the types of unions include:

- company union: groups employees from the same company;
- inter-company union: groups employees from two or more different employers;
- union of independent employees: groups together employees who are not dependent on any employer;
- union of eventual or transitory employees: made up of employees who perform work under dependency and subordination, in cyclical periods.

Employers can also amalgamate, for example, through trade associations; defined as organisations of natural or legal persons, formed with the purpose of promoting the rationalisation, development and protection of the activities which are common to them by reason of their profession, trades or branch of production or services, and those related to such common activities, such as the National Chamber of Commerce.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

Unions are regulated by the Labour Code, which recognises the autonomy of these organisations. Under the law, their main purposes are to represent the employees in exercising their rights, foster integration between employers and employees, check compliance with social security and labour legislation, help their members, promote education and improvement of safety in the work place and provide non-profit services to the members. Employees are free to join a union or refrain from these organisations. Employees may join only one union in a single company. Under the law, more than one union may exist in each company.

3.TYPES OF REPRESENTATION

The union's board of directors represents the union judicially and extra-judicially.

A. NUMBER OF REPRESENTATIVES

The number of directors must be freely fixed in the bylaws of the union, except in those unions with less than 25 members, in which case, they will be directed by one union director, who must act as president and who enjoys labour protection. However, labour permissions and protections that the law grants to union directors, correspond exclusively as follows:

- union that gathers between 25 and 249 members: 3 directors
- union that groups between 250 and 999 members: 5 directors
- union having between 1,000 and 2,999 members: 7 directors
- union formed by 3,000 or more members: 9 directors
- company syndicates, with presence in two or more regions and gathering 3,000 or more members: 11 directors.

B. APPOINTMENT OF REPRESENTATIVES

The union's bylaws should regulate the method, opportunity and publicity in which nominations are to be made. In the event that the bylaws do not regulate this matter, the law will determine the manner of such proceedings; and provides that nominations must be submitted, in writing, to the secretary of the union, no earlier than 15 days, but no later than 2 days, prior to the election. The secretary must communicate the nomination to the Labour Department. Thereafter, the candidates who obtain the highest relative majorities will be elected as directors of the union.

4.TASKS AND OBLIGATIONS OF REPRESENTATIVES

In general, representatives must carry out all of the activities contemplated in the bylaws of the union and which are not otherwise prohibited by law. Their fundamental purpose is to provide representation to the union members and to protect the employees.

5.EMPLOYEES' REPRESENTATION IN MANAGEMENT

The bylaws of the unions should establish the entities responsible for verifying the electoral procedures and the acts that must be carried out to express the collective will. In addition, the bylaws must establish the number of votes to which each member is entitled and must adopt measures to ensure respect for minorities. Furthermore, the bylaws must regulate the control mechanisms and the annual accounting, which the board of directors must submit to the assembly of members.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Health and Safety Committee: mandatory in companies with more than 25 employees; must be composed of three representatives of the employer and three representatives of the employees, whose decisions are binding for the company. This committee serves to detect and evaluate the risks of accidents and occupational diseases that employees may suffer.

Bipartite Training Committee: mandatory in companies with 15 or more employees; must be composed of three representatives of the employer and three representatives of the employees. Its function is to evaluate and agree upon the occupational training program(s) of the company and to advise the company's management on training matters.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

In 1980, the government introduced a major change to the Chilean Social Security system, making a transition from government-administrated pension and healthcare systems, to contributions made to funds administered by private entities, subject to overall government control. Under Decree Law Nº 3,500 of 1981, old-age pensions are financed exclusively by the employees through contributions that are accumulated in individual accounts at entities known as Administradoras de Fondos de Pensiones (AFP). For these purposes, employees must contribute 10% of their monthly remuneration up to a maximum of 80,2 Unidades de Fomento (currently approximately US$3,334). In addition, employees must contribute 7% of their monthly remuneration for medical care, also up to an 80,2 UF cap. Finally, the employers must contribute between 1% and 1.5% of the employee's remuneration for disability and survival insurance (SIS). For purposes of labour and social security legislation, work may begin, as a general rule, at the age of 18 and retirement may occur at the age of 65 for men and at age 60 for women. Nevertheless, the Social Security System contains provisions which allow for early retirement in certain cases. In Chile, retirement is not a legal cause for termination.

2. HEALTHCARE AND INSURANCES

The Social Security system covers all employees, including independent employees. The latter are legally obliged to contribute to a mandatory insurance that covers old age, disability and survivorship insurance.

A. FOREIGN EMPLOYEES

In the case of foreign employees, as a general rule, they must also pay social security contributions as indicated above. However, Law Nº 18,156 grants exemption from social security contributions to foreign technician employees and the company that contracts them, provided that certain conditions are met: i) the expatriate subscribes to a social security system outside Chile covering at least illness, pension, disability and death; and ii) the employee expressly declares in his employment agreement that he will remain affiliated and paying the foreign social security system.

B. ACCIDENTS OR PROFESSIONAL ILLNESS

Insurance for accidents or professional illnesses provides for medical and dental attention, hospitalisation and medicine, as well as indemnities (depending on the type of disabilities suffered) and related expenses.

C. UNEMPLOYMENT INSURANCE

Unemployment insurance is financed on a tripartite basis, as the contributions are paid by the employer, the employee (2.4% and 0.6% of the employees' taxable remuneration up to a maximum of 120 UF, respectively) and the government. This insurance is mandatory for every employee hired after 1 October 2002, whereas it is discretional for those employees hired before said date. In the case of fixed-term contracts, the entire contribution (3%) is exclusively financed by the employer.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

Employees who have worked for more than one year have the right to an annual paid vacation of 15 working days. The holiday must be continuous, but the excess over the 10 working days may be divided by mutual agreement. After working ten years, continuously or not, for the same or different employers, vacations are extended by one working day for every three years of service for his current employer. In case of employees who work in the

11th and 12th Regions of the country and the province of Palena, the basic vacation period is 20 days.

Sundays and days legally established as holidays shall be non-working days, except for activities authorised by law to be performed on those days. Companies exempt from this prohibition must compensate their employees with a paid day off in exchange for worked Sundays or holidays. However, in certain activities, at least two rest days in the month must be granted on Sundays. When more than one paid day off is accumulated in one week, the parties may agree on a special distribution or on a special remuneration mechanism. In the latter case, remuneration for the compensated rest day has a surcharge that cannot be less than 50%.

B. MATERNITY AND PATERNITY LEAVE

Female employees are entitled to six weeks leave before (prenatal leave) and twelve weeks after (postnatal leave) the birth of a child, on full pay. This payment is made by the Social Security system and not by the employer. In addition, women cannot be dismissed during pregnancy and for a period of one year as from the end of the postnatal leave, other than with prior authorisation of a labour court. Additionally, to the referred postnatal leave, exists a supplementary permit that as a general rule, provides a 12 weeks' permit after the end of the postnatal dispensation of the mother, on full pay. Nevertheless, the mother entitled to this benefit may choose to return to her job in a part time schedule, in which case the parental permit and subsidy is extended to 18 weeks. In this case, the subsidy granted by the Social Security System is reduced to 50% of its salary and the employer must pay, at least, 50% of the remuneration set forth in the labour agreement and all variable remuneration to which she is entitled. Likewise, the mother may benefit the father of the child by granting him part of the parental leave. In this case, the subsidy will be paid according to the salary of the father.

When the health of a child under one year of age requires attention at home as a result of a serious illness, which circumstances will be demonstrated through a medical certificate issued by the services in charge of the infant's health, the employee mother will be allowed to an employment leave and subsidy allowance in cases of prenatal, postnatal and paternal postnatal leaves, during the period prescribed by the health service. If both parents are under a labour agreement, either one of them, at the mother's choice, will be able to use this permit and will be entitled to the corresponding subsidy allowance. However, the father will be entitled to these rights in case the mother of the child is deceased or if the legal custody has been granted by a judicial ruling. Furthermore, the employee who has been entrusted by a court of law with the personal care of a child less than one year old, as a protection measure, shall also be entitled to such leave and subsidy allowance. This right shall be extended to the spouse or civil partner mentioned above.

Establishments with 20 or more female employees, regardless of their age or marital status, must provide a nursery service for children under 2 years old. Employers may contribute to an external nursery school to provide such service. While the women are feeding their babies, they must be granted one hour a day for this purpose.

C. SICKNESS AND DISABILITY LEAVE

Chile provides a public and private medical system for employees including preventive and curative health care. The preventive medical service provides for periodic medical checks. When employees are found to suffer a specific illness, they are granted sick leave. During periods of sick leave the employer cannot terminate the labour contract without cause, but the medical system pays the salary starting on the fourth day of illness or the first day in case of leaves exceeding 10 days. A monthly cap applies. This system is funded through employees' contributions.

D. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

In the event of the death of a child, spouse or civil partner, every employee shall be entitled to 7 calendar days of paid permit, in addition to the legal vacations to which the employee is entitled to. In this case, the employee shall also be entitled to labour protection or immunity for one month, as from the date of death, thus entailing that said employee cannot be fired unless a labour court has previously authorised such dismissal. However,

regarding employees hired for a fixed-term or for a specific task or service, the labour privileges shall be afforded to them only during the effective term of the corresponding employment contract, if said term is less than one month, without requiring the court's authorisation. This allowance shall amount to three business days in the event of death of a child during pregnancy, as well as in the event of death of the employee's father or mother, albeit without granting the benefit of said labour privileges or immunity.

In case of marriage or civil union, every employee shall be entitled to 5 continuous working days of paid leave, in addition to the annual holiday. This leave may be used, at the employee's option, on the day of the marriage and on the days immediately before or after the marriage.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Indemnities are granted in the form of a pension to the injured employee or to his/her spouse and dependent children in case of death of the employee. The Employees' Compensation Fund is funded through a base contribution (made by the employer) of 0.90% of the employee's salary (with a cap of 80,2 UF per base salary), plus an additional payment, which must be borne by the employer exclusively depending on the activity and level of risk of the company (additional rate from 0% to 3.4%).

5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Employers have no legal obligation to provide fringe benefits, other than benefits which may be voluntarily agreed in individual or collective contracts or agreements. Pension and sickness benefits are covered by the Social Security system. There is no legal obligation to provide catering facilities and meals.

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CARIOLA DÍEZ PÉREZ-COTAPOS
CHILE

The Labour and Social Security practice group at Cariola Díez Pérez-Cotapos provides advice and counsel on all legal and regulatory matters governing labour and social security activities in Chile. Our services include drafting and preparing the full range of employment agreements, suited to all forms of contract arrangements allowed under current legislation; structuring compensation and benefits packages, stock option programs, and preventive labour audits; supporting corporate restructuring processes with an impact on labour; and counseling clients related to outsourcing of services methods and procedures.

Our advice also includes the drafting of employment contracts for foreign personnel and the preparation and monitoring of the corresponding applications for work permits and visas, providing support in all matters of interest to foreign executives residing in Chile.

We also advise companies in collective bargaining processes, both with unions and with groups of workers, minimum services requests, assistance in case of a strike, mediation processes, and the preparation of contracts and collective bargaining agreements. Cariola Díez Pérez-Cotapos is consistently recognised as a leading firm in Chile for labour and employment law services by industry insiders such as Chambers, The Legal 500 and the Latin Lawyer 250, among others.

This memorandum has been provided by:

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