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EMPLOYMENT LAW OVERVIEW  
**COLOMBIA** 2019-2020

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# I. GENERAL OVERVIEW

## 1. INTRODUCTION

Colombian labor law is governed mainly by the Labor code, which dates from 1950. The applicability of these rules is done (directly) through the law. Though collective labor law rules have not experienced any significant changes since 2008, there currently exists a segment of 'legal unity' in Colombia, which is an important dynamic in the employment relations regarding trade unions.

Colombian labor rules and principles are not only considered a public policy rule, but most of these principles also have a constitutional hierarchy, together with the International treaties or conventions that recognize human rights ratified by Colombia. The consequence of this situation is that employers cannot (even with the employee's approval) provide conditions worse than those recognized by the law, the constitution or an international treaty or convention, which recognizes human rights ratified by Colombia.

Efforts have been made to add flexibility to the Colombian labor market to match globalized standards. Three main reforms to the labor rules have been made to accomplish this objective: The 50 Act of 1990, The 789 Act of 2002 and The 797 Act of 2003.

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## 2. KEY POINTS

- Employee-legislation in Colombia is divided (due to its importance) in specific rules compilations for each specialty: Labor rules, social security, procedural rules and employment law.
- Even when employment contracts, as a general rule, are considered an indefinite term, Colombian labor law is flexible in comparison to other countries, as it provides the possibility to use flexible forms of employment without major restrictions.
- Colombian labor law provides high flexibility regarding dismissal. However, in recent years the case law has developed greater protection to prevent possible discriminatory situations.
- Foreigners are only allowed to work in Colombia through a work permit or with a residence permit if they are planning (or are currently) to stay permanently in the country.
- Constitutional actions ("Tutela") demanding immediate protection of fundamental rights provides an important source for labor norms, as a result of the interpretation of the written labor rules.

## 3. LEGAL FRAMEWORK

Labor law normativity is provided by the Constitution (Fundamental employees' rights) and the law. Bills can only be issued by the Congress and/or the President in exercise of exceptional powers, but does not allow for the municipalities and/or departments to issue normativity regarding labor matters. The Ministries as part of the executive power are allowed to issue Decrees to develop the content of a law, but not to modify it or derogate it. In particular, the Ministry of Labor is the highest executive authority regarding labor matters.

The Pensions and Contributions Control Unit (UGPP by its initials in Spanish) plays also an important role as an audit governmental body, which exercises control regarding contributions to the social security system.

The main framework for labor law in Colombia is provided by the Colombian Labor Code (CST by its initials in Spanish) issued by the Legislative Decree 3743 of 1950. Despite its longevity, the Labor Code has been the subject of modifications mainly to add

flexibility to the labor market to adjust Colombia's rules with regards to a more globalized world.

In 2015, the government issued the 1072 Decree (Regulatory Decree of the Labor Sector) to condense all existing normativity regarding labor matters in a unique document to ease their access.

The Constitutional Court and the Supreme Court, besides the fact that Colombia has a continental legal system, play a key role in Colombian legal framework as the Constitution and the law establishes precedent as mandatory for inferior hierarchical judges to comply with.

## 4. NEW DEVELOPMENTS

- The widespread use of outsourcing has prompted the discussion over potential limitations on the possibility to outsource activities directly related to the Companies' business core. In 2018, the Ministry of Labor decided to derogate a Decree issued by the same Agency, which established stricter rules on outsourcing and the responsibilities from the contractor.
- Due to the recent presidential elections (President Ivan Duque has been in Office since August 2018), there are expectations for three main reforms in labor law matters: (i) Pension reform. (ii) Formalization reform (self-employed persons who are not covered by any social security scheme). (iii) Reform on the collective bargaining procedure rules.

# II. PRE-EMPLOYMENT CONSIDERATIONS

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

In application to the principle of reality over the formalities, a local entity is not needed to consider the existence of an employment contract. However, a local entity might be needed to be established in Colombia to comply with certain obligations regarding contributions to the social security system.

## 2. LIMITATIONS ON BACKGROUND CHECKS

Express prohibitions over background checks in the legislation include the following:

- HIV tests or conditions.
- Pregnancy test.
- Mandatory military service approval.
- Unionized condition.
- Diseases or disabilities.
- Blacklists.
- In general, it must be said that any background check that might be considered discriminatory is prohibited, unless and objective justification is proven.

Also, data protection legislation (The 1581 Act of 2012) provides certain restrictions over the information potential employers and former ones can publish about its candidates and former employees.

## 3. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Employers are prohibited to ask any question that may be considered discriminatory. Any question or restriction on the application of a candidate regarding his age, sexual orientation, civil status, religious beliefs, political opinion, language, race, diseases, unionized condition or any other consideration that does not have any relation with the position to be performed, and might lead to a discriminatory ground, must be avoided. In particular, employers are forbidden to ask potential candidates to perform HIV and/or pregnancy tests as a condition for the application, unless this condition is proving to be incompatible with the position the person applied for.

# III. EMPLOYMENT CONTRACTS

## 1. MINIMUM REQUIREMENTS

Employment contracts are deemed as such if they reunite three conditions: (i) services are provided by the person directly; (ii) subordination from the employee towards the alleged employer; (iii) a payment as a retribution of the service provided. If these three conditions are met the relationship will be considered as an employment contract, disregarding the name or agreement the parties signed. Employment contracts can be both verbal and in writing. However, in verbal contracts the parties must agree, at least, on the following points: (i) the nature of the service to provide; (ii) the amount and form of the compensation; (iii) the contract's length. Apart from the general requirements for the existence of an employment contract, some contractual types demand specific requirements to be considered as such.

## 2. FIXED-TERM/OPEN-ENDED CONTRACTS

In addition to having to comply with the general as well as any specific requirements that may apply, fixed-term contracts are obliged to be in writing to be considered as such. Fixed-term contracts can be signed with any employee, whether the service provided can be considered permanent or temporary within the organization. The labor code establishes that the fixed-term contract length is free for the parties to determine, but it cannot exceed three (3) years. There is also no limitation for the possibility of successive fixed-term contracts or renewals.

However, in the case of fixed-term contracts agreed for an initial period of less than one (1) year, the law establishes a limitation of three successive renewals

of the initial contract, after which the period of the contract will be considered for at least one (1) year, but can be renewed indefinitely.

While the labor code does not establish the need to argue a cause to terminate the contract by the expiration date, the case law has prohibited the termination of the employment contract when the decision can be deemed to have resulted from discriminatory reasons or infringes upon a superior hierarchical right.

## 3. TRIAL PERIOD

The trial period must be agreed in writing. Its length varies depending on the type of contract agreed by the parties, but cannot exceed in any case two (2) months. For fixed-term contracts or definite period ones (i.e. employment contracts for completing a specific task or the occurrence of a specific event) the trial period cannot exceed a one-fifth part (1/5) of the term initially agreed. When considering the existence of successive employment contracts, the parties cannot agree to trial periods, but for the first contract.

## 4. NOTICE PERIOD

Colombian legislation only provides, in general, the need of a period of notice by the employer in the event to terminate a fixed-term contract by its expiration date. The employer is obliged to notify the employee of his decision to terminate the contract by its expiration date at least 30 days before the occurrence of the term agreed. In case the employer fails to comply with the period, the fixed-term contract will be renewed for the same term than the initially agreed. While the employee, according to the law, is also obliged to comply with a period of notice in the same terms than the employer, this rule is nowadays not enforceable.

In some specific cases, the legislation provides the need to comply with a particular period of notice to terminate the contract alleging a cause or “justa causa”.

For employees considered to be the subject of a special protection (i.e. disabled persons, pregnant employees, certain unionized employees) the employer needs to observe an ‘a priori’ control procedure to terminate the contract. Although this is not deemed to be a period of notice, it often requires the observation of a notification to the employee of the procedure that will be followed.

# IV. WORKING CONDITIONS

## 1. MINIMUM WORKING CONDITIONS

Employees in Colombia enjoy the rights established by the Political Constitution, the ILO conventions ratified by Colombia, the Labor Code and any other regulation that develops labor rules. As labor norms enjoy the nature of public policy, the parties cannot agree against them or for the employee to renounce a labor right granted by law, but the employer is allowed to provide better benefits and/or rights for the employees than those established in the law.

## 2. SALARY

The statutory minimum wage for employees who work the maximum working time for 2018 is \$781.242 COP with a mandatory transport allowance of \$88.211 COP (mandatory for employees who earns up to 2 times the minimum wage). This does not prevent the possibility for the employer to provide a superior minimum wage within its organization whether by its unilateral decision or by collective agreement.

Compensation regarded as salary comprises not only the employee's agreed fixed and/or variable salary, but any payment which is recognized as a retribution for the services the employee provides to the employer, regardless of its designation, in the case of commissions, habitual bonuses and overtime work payments. The salary can be either in kind or cash, but the salary in kind cannot exceed 30% of the total salary agreed.

The salary can also be agreed on any legal currency. The employee is entitled to ask the payment in Colombian Peso (COP), in which case it must be done at the official exchange rate on the day the

payment must be issued by the employer. For employees who are paid 'per day' the salary in cash wage payment cannot exceed one week. For employees whose salary is based on a monthly fee, their payment has to be done at least once every month.

The Labor Code also provides the possibility for the employer to recognize non-salary payments as part of the compensation of the employee (cannot exceed 40% of the total compensation for social security purposes). The importance to delimitate these two concepts is so that only the payments regarded as salary serve as a base for the calculation of legal benefits and social security contributions/benefits.

**Integrated salary:** For employees who earn a salary equivalent to at least ten (10) times the minimum wage or more, an "integrated" salary can be agreed. An "Integrated" salary agreement must be in writing.

The employee will receive a monthly payment which includes two factors: i) the personal service economic retribution, and ii) a fixed amount of at least the 30% of the salary, which compensates in advance statutory benefits, overtime work, work on Sundays and any other payment expressly included in the "integrated" salary agreement, except vacations. Therefore, the total monthly minimum integrated salary amount is 13 times the minimum wage.

## 3. MAXIMUM WORKING WEEK

The ordinary working time cannot exceed 8 hours per day and 48 hours per week, with the employee being entitled to a mandatory rest day, normally on Sunday. However, the law allows for the parties to

agree that the daily working time can be distributed between 4 and 10 hours per day ensuring the maximum working week (48 hours).

The daily working time must be distributed in at least two parts, with a rest period between both of them. This rest period between both sections is not considered part of the daily working time.

Colombian labor law also provides different forms to distribute the maximum working time in accordance with the ILO conventions ratified by the country and the different industries' needs.

## 4. OVERTIME

Overtime hourly work compensation rate is 25% over regular hour payment. The following employees are not entitled to overtime work compensation: (i) employees who earn an "integrated" salary (only possible for employees who earn more than ten times the minimum wage) and; (ii) employees that occupy trust positions (However, they are entitled to receive Night hours and Sundays overtime payments).

Employees who work night hours (From 09:00 PM to 06:00 AM) are entitled to a special overcharge of 35% over their regular hourly compensation, disregarding other special compensations like overtime compensation. Work on Sundays and/or public holidays must be paid with an overcharge of 75% over the regular compensation.

## 5. HEALTH AND SAFETY IN THE WORKPLACE

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

The employer is expressly obliged to provide his employees with a safe workplace and the necessary and adequate elements and tools to prevent work accidents and professional diseases. Since 2014, every employer or contracting party must implement the "Safety and Health at Work Management System" to ensure the enforcement of all health and safety at work legislation, the

improvement of the work environment and conditions, and the control of any hazard or danger in the workplace. This system includes not only the employees of a Company but also its contractors and subcontractors.

### B. COMPLAINT PROCEDURES

The Ministry of Labor through the labor inspectorate (administrative authority) is in charge of the Health and Safety complaints. The formal procedure may come from a direct complaint by an employee (or anonymously) regarding an alleged breach of a Health and Safety procedure by the employer. The Labor Inspectorate is also entitled to, unilaterally, make a visit to an employer or request information of his "Safety and Health at Work Management System" and initiate a complaint procedure if he finds an anomaly in the information provided.

### C. PROTECTION FROM RETALIATION

Colombian Labor law does not provide any special protection specifically for employees who present a formal complaint against their employer for failing to comply with the Health and Safety legislation.

# V. ANTI-DISCRIMINATION LAWS

## 1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

The Colombian Political Constitution recognizes the right of equal treatment and the prohibition of discrimination on basis of sex, race, national origin, language, religion or ideology. In the legal framework, Colombia has provided special protection for other groups like disabled people, unionized employees and pregnant women. The Colombian Constitutional Court has developed the special protection on anti-discrimination laws even further for other groups.

## 2. EXTENT OF PROTECTION

Employers are prohibited from any measure that could be considered discriminatory against his employees (or potential one) in every aspect of the employment contract, including any question or conduct that could be considered discriminatory in a hiring process (i.e. a request for an HIV and/or pregnancy test without an objective justification), whether the discrimination is through a direct or indirect conduct.

Anti-discrimination laws in Colombia have been developed mostly through case law, by reinforcing the protection for these special groups to other forms of employment. The protection extent is normally the prohibition of dismissal if the termination leads to a discriminatory ground or infringes upon a superior hierarchical right.

Private sector employers, while encouraged through some benefits, are not subject to any mandatory affirmative action law.

## 3. PROTECTIONS AGAINST HARASSMENT

Since 2006, Colombian legislation provided a special scheme for protection against harassment in the workplace. In general, harassment in the workplace is considered any conduct persistent and provable, executed on an employee aimed to instill fear, intimidation, terror or anxiety, cause harm on his work, demotivation, or the employee's resignation.

Protection against harassment includes the obligation for the Company to create a special body within the organization to analyze the harassment complaints, constituted by employees' and employer representatives.

Employees who filed a complaint as victims of harassment cannot be dismissed without a fair cause in the following six months after the formal complaint. This special protection also applies to the employees who served as witnesses in a process of harassment.

## 4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Colombian legislation does require the obligation for any undertaking to compel with certain legal minimum standards, which may include the need to provide certain facilities for disabled persons, whether they are employees or visitors. In addition to this, the law requires the employer to comply with the competent authority's rehabilitation report

regarding his disabled employees, including any ergonomic or (special) workplace accommodation.

From 2019 or 2022 (depending the number of employees), employers will be obliged to provide special facilities inside the workplace for nursing employees.

Even while the Colombian Constitution recognizes the freedom of religious belief, there is not a specific provision that obliges the employer to accommodate the workplace for the employee's religious practices. Nevertheless, the case law has recognized the possibility for the employee to excuse himself (be absent) from working on certain days for religious reasons.

Special regulations exist regarding this matter for employers in the oil and mining sector.

## 5. REMEDIES

Employers can implement any kind of unilateral internal policy that promotes anti-discriminatory rules for his employees, providers and/or contractors.

In case an employee is found responsible for a discriminatory behavior, it is usually possible to terminate the contract without a severance payment for the employee. In the specific case of harassment in the workplace, the 1010 Act of 2006 obliged the employer to create a special internal body to analyze the harassment complaints.

## 6. OTHER REQUIREMENTS

While Companies which hire employees in a special situation (i.e. disabled persons) can access certain benefits from the government like tax relief, there is no mandatory quotas or affirmative actions for the private sector employers.

Despite the fact that it is not necessarily linked with an anti-discriminatory rule, in the oil sector there exists quotas for private sector employers to hire employees from the respective geographical zone for the non-qualified jobs.

# VI. SOCIAL MEDIA AND DATA PRIVACY

## 1. RESTRICTIONS IN THE WORKPLACE

Restrictions on the use of electronic devices and the internet for personal purposes in the workplace are allowed, with the understanding that such faculty is under the scope of the subordination power of the employer. The Constitutional Court considers that the legislation and the case law allow the employer to not only limit the use of social media and electronic devices in the workplace, but also to exercise control to verify this situation, in accordance with the principle of reasonability and proportionality. In addition to this, the 1581 Act of 2012 establishes general restrictions for the use and administration of data bases including information regarding employees.

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

The employer can monitor and access the employee's electronic communications or any other application as long as they are related to the employee's position or the electronic mail and/or application is provided by the employer as a working tool. Any control on the employee's electronic communications must attend to the principle of reasonability and proportionality, in order to avoid a possible breach of the employee's intimacy.

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

There is also no specific provision in Colombia regarding this matter. However, the case law has understood that while social media is part of the employee's intimacy circle, and therefore cannot be monitored by the employer, there are some actions that may cause harm to the employer through social media. The use of social media to disparage the employer or to divulge confidential information of the Company may cause damages to his public image and his interests, which then allows him to initiate disciplinary measures as a consequence of this situation.

In any case, the divulgation of confidential information by the employee is considered by Colombian labor law as an express prohibition and can lead eventually to the possibility to terminate the employment contract by the employer, alleging a fair cause.

# VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

## REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Every foreign person needs a special permit or 'VISA' to perform his services in Colombia. The requirements for a foreign employee to perform his services in Colombia was recently changed by the 6045 Resolution of 2017. To determine which category or special permit must be requested for the potential foreign employee, it is important to establish whether the service to be performed by the foreigner is temporary (short duration) or permanent (long duration). However, there are special considerations for foreign employees who have a proper resident VISA. A work permit for a foreign employee which was recognized for this sole purpose, only allows the employee to perform the services for the position, company and/or profession wherewith the VISA was authorized.

# VIII. TERMINATION OF EMPLOYMENT CONTRACTS

## 1. GROUNDS FOR TERMINATION

In Colombia, employment contracts may be terminated by any of the parties at any moment with immediate effects (as a period of notice is only needed for fixed-term contracts when ended by the expiration date) and without it being necessary to mention the reasons that led to the termination, unless a fair cause is alleged for the dismissal. Grounds for termination in Colombian legislation can be divided into three categories: (i) Legal grounds. (ii) Termination with a fair cause. (iii) Termination without a fair cause.

On legal grounds one can find those termination grounds which are unrelated to the behavior of the employee, but rather the operation of the law that mandates the termination of the contract. In this case one can find the death of the employee, the expiration date of the term initially agreed in a fixed-term contract and/or the meeting of the condition or culmination of the task in the employment contracts by a definite task. In this case, as the employment contract ends because of the operation of the law, the employee or his survivors are not entitled to a severance payment.

The termination with a fair cause refers normally to situations related to gross misconduct by the employee, with the exception of the recognition of the invalidity or old age pension. These fair cause grounds are defined explicitly by law and the parties cannot add supplementary grounds as a basis for the contract to be terminated. However, the parties do have the possibility, through the contract or the Company manual, to define situations that by their nature can be considered as serious misconduct.

The termination without a cause includes all situations that are not considered as a legal

cause or a fair cause. Only in the termination of an employment contract considered as without a cause, is the employee entitled to a severance payment in accordance to the law.

The termination without a cause does not require a period of notice, but finds limitations for its use in situations that might be considered arbitrary or infringes upon a superior hierarchical right normally related to employees under special protection (i.e. Union representatives, pregnant employees, disabled persons). A termination in these situations can be considered void; and therefore, the consequence might not be the recognition of a severance payment, but the reinstatement of the employee.

As mentioned before, employees are also entitled to terminate the employment contract at any moment, for any reason, or alleging a fair cause. In case the employee opts to terminate his employment contract, alleging a breach by the employer (fair cause), the Labor Code mandates the obligation to pay a severance payment as if the contract were terminated without a fair cause.

## 2. COLLECTIVE DISMISSALS

The 50 Act of 1990 establishes the requirements for a collective dismissal, which in Colombia, applies to a dismissal that affects, in a period of six months, a number employees equal to: (i) 30% of the total employees in Companies with a total share of employees higher than 10 but lower than 50; (ii) 20% of the total employees in Companies with a total share of employees higher than 50 but lower than 100; (iii) 15% of the total employees in Companies with a total share of employees higher than 100 but lower than 200; (iv) 9% of the total employees in Companies with a total share of employees higher than 200 but lower than 500; (v) 7% of the total employees in Companies with a

total share of employees higher than 500 but lower than 1000 and; (vi) 5% of the total employees in Companies with a total share of employees higher than 1000.

The percentages mentioned above are only calculated when considering terminations without a fair cause, not those alleging a legal ground or a fair cause.

For a Company to proceed with a collective dismissal, it needs, beforehand, to receive authorization from the Ministry of Labor.

### 3. INDIVIDUAL DISMISSALS

Individual dismissals, unlike the collective dismissals, do not require a previous authorization by any authority, as the employer is free to terminate the employment contract at any time. However, for the dismissal of an employee under some types of special protection, an authorization from the labor inspectorate is needed (pregnant women, disabled employees).

In the case of employees under special protection for their unionized condition (“fuero sindical”) a previous authorization is required by the Labor judge.

A termination with or without cause should be communicated to the other party in writing and entitle the employee to the payment of his salary and social benefits until his last day of work, and depending on his termination grounds, a severance payment might be paid.

#### A. IS SEVERANCE PAY REQUIRED?

Only for a dismissal without a cause. The amount of the severance payment differs in several factors such as Seniority, type of contract and amount of the salary. Severance payment in Colombia does not have a limitation in the amount to be recognized by the employer.

The severance payment for employees with a definite period contract is equal to the salary of the time remaining for the expiration date, disregarding the employee’s seniority or salary.

In case of an employee with an indefinite period contract, there are currently three systems applicable, depending on his seniority in the Company:

**For employees hired before January 1, 1981** the system applicable is the 2351 Presidential Decree of 1965: These employees have a special stability regime which excludes the possibility of termination without cause. Nevertheless, in exceptional cases whenever this termination is applicable, the severance payment corresponds to 45 days of salary for the first year of service and 30 days of salary for each subsequent year of service or pro rata.

**For employees hired before December 28, 1992** the system applicable is the 50 Act of 1990: In this regime, severance payments correspond to 45 days of salary for the first year of service and 40 days for each subsequent year of service or pro rata.

**For employees hired after December 28, 1992** the system applicable is the 789 Act of 2002: In this regime, the severance payment formula depends on the employee’s salary amount. For employees that earn less than ten (10) times the minimum wage, the severance payment corresponds to 30 days of salary for the first year of service and 20 days for each subsequent year of service or pro rata. For employees that earn ten (10) times the minimum wage or more, severance payments correspond to 20 days of salary for the first year of service and 15 days for each subsequent year of service or pro rata.

The reference to calculate the severance payment must take into account the last fixed salary. In case of variable salary, the reference would be the average of the salaries earned in the last twelve months.

Colombian legislation provides a fixed system of calculation for the severance payment. Nonetheless, employees can claim moral damages in addition to the severance payment provided by law.

## 4. SEPARATION AGREEMENTS

### A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

Colombian Labor law does not require a separation agreement to terminate a contract. Nevertheless, it allows its application. These kinds of agreements are not only widespread in the labor market, but are generally recommended to terminate the contract of high executives and employees under special protection.

Separation agreements are binding for the parties in those rights which are not considered as “true and certain” as these rights are neither renounceable nor negotiable by the employee. For example, an employer can negotiate, in a separation agreement, the damages caused from a late payment of salaries and/or social benefits to his employees, but cannot sign a separation agreement to renounce his obligations with regards to the mandatory contributions he must pay, for an employee, to the social security system.

### B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

The standard provisions are: (a) A clause where the employee grants general release to the employer, his subsidiaries and/or headquarters from any claim that might arise from the employment contract with the Company and specifically the situation in discussion; (b) In order for the agreement to have a res judicata effect, mutual concessions must be made between the parties, which normally means a clause acknowledging an amount of money to be recognized to the employee, its form of payment and instalments (if applicable).

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

No.

### D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

If the intention, through the Separation Agreement, is for such document to have a res judicata effect, the agreement must be made by a “transacción” contract or a “conciliación” contract; both require mutual concessions by the parties.

In the case of the “transacción” contract, the subscription is made only by the parties. On the other hand, the “conciliación” contract requires, for its validity, to be approved and signed, in addition, by the Labor judge or the Labor inspectorate.

## 5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Wrongful termination claims are analyzed by the judge as the competent authority. Wrongful termination based on a legal ground (i.e. alleging the absence of a cause for the termination) leads to the recognition of the severance payment the employee would be entitled to if his contract would be terminated without a cause.

Wrongful termination based on the breach of a fundamental right (i.e. discrimination grounds and/or harassment) might lead to the reinstatement of the employee in the position he was in before being dismissed, or an equivalent one, plus the payment of the salaries and benefits for the period he remained dismissed, because of the employer’s wrongful termination.

## 6. WHISTLEBLOWER LAWS

Colombian labor law does not include any special provisions or protections for whistleblowers. However, employees who served as witnesses in a claim of harassment cannot be dismissed without a fair cause in the following six months after the formal complaint, as long as the claimant is effectively considered a victim of harassment.

# IX. RESTRICTIVE COVENANTS

## 1. DEFINITION OF RESTRICTIVE COVENANTS

Provisions on restrictive covenants in Colombian labor law are scarce. The legislation only provides rules for non-compete clauses. Scholars have tried to bring to employment contracts some restrictive covenants normally used for commercial/civil contracts, under the assumption that these clauses may be applicable to employment relationships, as its nature is similar to any other contractual relationship.

Restrictive covenants are therefore allowed, under some general limitations. Any clause that may limit the employee's right to work (which includes his right to access new employment) is considered ineffective and cannot be enforced by a judge, even if the employee consented to the use of such a clause.

## 2. TYPES OF RESTRICTIVE COVENANTS

### A. NON-COMPETE CLAUSES

Article 44 of the Colombian Labor Code expressly allows for the possibility of the employer to agree with his personnel, on a general prohibition to provide services in determined activities or the employer's competitors. This class of non-compete clauses are only allowed by law while the employment contract is ongoing. Non-compete clauses for employees that are meant to apply after the employment contract has ended, are invalid.

### B. NON-SOLICITATION OF CUSTOMERS

Such a provision does not exist in Colombian labor law. However, restrictive covenants on non-solicitation of customers are often used for high-executive employees. Scholars have understood that these kinds of specific clauses are valid as long as they respond to a principle of proportionality and reasonability.

While a clause of this nature may restrict the former employee's right to work, a limitation on the former employee's possibilities to perform actions that might harm the Company through direct solicitation of customers, are proportional and reasonable to protect the Company interests.

In any case, competition law establishes special provisions towards the restrictions of conducts that might be considered unfair competition.

### C. NON-SOLICITATION OF EMPLOYEES

These types of restrictive covenants are not normally used for employees in their employment contracts, but rather between Companies in their commercial relationships to avoid possible acts of unfair competition. The applicability of these clauses between Companies must attend criteria of proportionality and reasonability to avoid a possible violation of the right to work.

## 3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

Restrictive covenants may be included in the employment contract (normally used for non-compete clauses) or in separate documents during

the employment relationship or after it. A violation of a restrictive covenant during the employment contract can be subject to disciplinary measures from the employer and eventually the termination of the contract with a fair cause.

The violation of a restrictive covenant, which intends to apply after the employment relationship ends, can be enforceable through a legal claim against the former employee.

## **4. USE AND LIMITATIONS OF GARDEN LEAVE**

Garden leave practice is allowed in Colombian Labor law. The employer can restrict his employees from attending to work, but the obligation to pay their salary, as if it was a unilateral paid leave, remains. However, this possibility finds a limitation whenever the request from the employer for the employee to receive the unilateral paid leave may lead to a discriminatory measure or possible conduct of harassment against the employee.

# X. TRANSFER OF UNDERTAKINGS

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

In case of a transfer of undertaking, the employment contract is not terminated, suspended or modified as long as there are no substantial changes in the activities of the new employer. Therefore, the employees have the right for their contract to remain with the same conditions, salary, working time, benefits and the seniority they were entitled to before the transfer took place. As the transferred is liable for all labor rights of the predecessor, the employee can claim the labor rights that he was entitled to before the transfer took place, from either his previous employer or the new one.

## 2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

Colombian labor law does not provide any special requirement from a labor point of view, for a transfer of undertaking to take place. The parties of the transfer can agree to any modifications of their own relations, as long as these agreements do not affect the labor rights of the employees.

# XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## 1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The possibility for employers and employees to associate through trade unions and employers' associations is guaranteed as a constitutional right. While this allows for the existence of employees' and employers' organizations, employers' organizations are not very common, nor are they generally used for collective bargaining, but rather for economical and coordination purposes within an industry. Collective bargaining is reserved for employers (individually considered) and trade unions.

There are three types of trade unions: (i) Company union, which gathers employees of the same company, regardless of their profession or position; (ii) Industry union, which gathers employees of the same economical sector disregarding their profession, position or employer; (iii) Gremial union, which gathers employees of the same profession regardless of their position or employer. For any of these types of trade unions to exist, a minimum number of 25 affiliates is required.

Employees can affiliate to multiple trade unions, even within the same Company. The collective bargaining process must be done with every trade union within the organization, disregarding their number of affiliates. Nowadays, and as a result of the Constitutional Court's case law, there are no specific rules regarding representativeness for trade unions for the collective bargaining process, or any other matter on claims or conversations with the employer.

## 2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

While it is not mandatory to be a member or constitute a trade union in Colombia, trade unions may negotiate, on behalf of their affiliates, to begin a collective bargaining. This process can only be initiated by the trade union; employers cannot call for a collective bargaining process.

The result of this negotiation between trade union and an employer is a collective bargaining agreement. These documents generally provide for special rules and benefits applicable for the unionized members, and if the trade union reunites the required majority (this may vary depending on the trade union representation within the Company) of affiliates within the organization, the collective bargaining agreement can be applicable to all employees, disregarding if they are affiliated or not.

As mentioned above, in Colombia there are no specific rules regarding representation for trade unions. Therefore, every trade union disregarding the number of affiliates enjoys the same rights for collective bargaining.

Trade union members may enjoy special protection in specific cases (i.e. during the collective bargaining process) and special permits for union purposes. This is important, because Colombia's labor law does not provide for any law regarding employees' participation in employer's decisions, other than through trade unions, and therefore these organizations serve as the main body for this purpose.

The Labor procedural rules allow trade unions to present claims on behalf of their members whenever they consider the existence of a breach of the collective bargaining agreement.

The right to strike is recognized as a constitutional right and its exercise must be made in accordance with democratic principles. In general, strikes can come as a result of three situations: (i) a failed collective bargaining process, where its definition and practice are regulated by law; (ii) as a result of a breach of legal and/or conventional rights by the employer (in this case, the exercise of the right to strike does not require a previous collective bargaining process) and; (iii) strike by solidarity where a trade union clings to the strike of another trade union, because of economic and/or political reasons.

Limitations on the right to strike apply to essential public services, as defined by law (i.e. public utilities sector).

The peace agreement signed with the FARC guerrilla includes the commitment of the government to propose new legislation related to social protest, which may modify the actual conditions of the right to strike in Colombia.

### 3. TYPES OF REPRESENTATION

Colombian labor law does not establish any law regarding the participation of the employees as representatives other than the role that trade unions serve for their members. While some improvement has been made in the last decade to involve employees' participation, these are meant for certain cases such as harassment in the workplace and health and safety committees, and are not intended to apply to specific roles of communication regarding general decisions that the employer is considering.

## 4. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

The 1295 Decree of 1994 established the obligation for every employer to constitute a health and safety committee, wherein the number of members varies according to the number of employees of the Company. Its composition is by an equal number of employer's representatives and employees' representatives.

The 1010 Act of 2006 established a mandatory harassment committee to address possible conducts considered as such, and to develop activities to improve the working environment for all employees. The number of members of this body varies according to the number of employees of the Company. Its composition is by an equal number of employer's representatives and employees' representatives.

# XII. EMPLOYEE BENEFITS

## 1. SOCIAL SECURITY

Employers and employees must make compulsory contributions to the Colombian Social Security System, which protects employees from certain social risks. The Colombian system is compound by the subsystems of healthcare, pension, labor risks and family allowance.

Employer's contributions for the social security system average thirty percent (30%) of the employee's contributory base income. The contribution percentage to the labor risks subsystem varies according to the level of risk the employee faces (the level of risk, and the activities framed in each, is defined by the law).

Employers who declare income tax in Colombia are entitled to an exoneration of their obligation to contribute to the social security subsystem in healthcare, family allowance and some other specific contributions, for their employees who earn up to 10 times the minimum wage. Such savings may lead to an employer's final contribution to the social security system as seventeen (17%) of the employee's contributory base income.

As the social security system is managed by different companies, both private and public legal natures respectively, the employee has the right to choose the Agency he wants to affiliate with for his healthcare and pension. The employer chooses the Agencies in the subsystems of labor risks and family allowance, as the contribution is assumed entirely by the employer.

The employer is responsible for withholding and delivering his and the employee's contributions. Any kind of special information that needs to be provided to the system involving the employee's situation, such as sickness, paid or unpaid leave, maternity, retirement from the Company, etc. must be provided by the employer, and it is the duty of the employee to provide information which may be of relevance to the system.

## 2. HEALTHCARE AND INSURANCES

Healthcare is in general, guaranteed by the social security system contributions. The affiliates and contributors to this subsystem may access a bundle of services in money and in kind. The services in kind are defined in the Obligatory Plan of Healthcare. Despite the fact of the coverage of the healthcare subsystem, it is possible for employers to provide their employees (as a benefit) with private healthcare or to cover a proportion of its costs. This benefit does not exclude the obligation for the parties to contribute to the social security system. In addition to the social risks covered by the social security system through an insurance scheme, the system provides, as a special insurance, a burial allowance in case of death of the employee.

## 3. REQUIRED LEAVE

### A. HOLIDAYS AND ANNUAL LEAVE

**Vacation:** Every employee in Colombia, regardless of the type of employment contract or its length, is entitled to fifteen (15) working days of paid holidays for every period of 12 months of services. The employees in private companies who provide services to fight tuberculosis and the application of X-rays are entitled to fifteen (15) working days of paid holidays for every six months of services. The employee may opt to enjoy his holidays in time or in money, without a paid leave, subject to limitations. For instance, the money option is limited to half of the annual mandatory period.

As a common practice, holidays are arranged by agreement between the employee and the employer. However, according to the legislation, the employer can unilaterally determine the period of holidays for his employees, with a notice of fifteen (15) days before the start of the paid leave. Holidays can be accumulated for up to two (2) periods or four (4) periods in the case of trust

employees, or foreigners whose family resides in a different place.

**Public holidays:** Employees are entitled to be absent from work on the public holidays defined by the law (Article 177 of the Colombian Labor Code establishes 18 public holidays) and are entitled to their regular remuneration. While it is common for the municipalities to create other public holidays related to local festivities, private employers are not bound to such holidays. If, under any circumstance, the employer requires an employee to work on a public holiday, such work must be remunerated as if the employee worked on a Sunday or his weekly rest day.

## B. MATERNITY / PATERNITY LEAVE

Female employees are entitled to at least eighteen (18) weeks of maternity leave, fully paid, including an adopted child (the paid leave can be higher in case of multiple or preterm birth); at least one week of the maternity leave (and a maximum of 2 weeks) must be taken before the child's birth. This payment is entirely under the charge of the Healthcare subsystem, as a benefit in money for the mother. On the other hand, the father is entitled to eight (8) working days of paternity leave, fully paid, also entirely under the charge of the Healthcare subsystem. The father might subrogate the mother's maternity leave in case of her demise, abandonment of the mother (single parent) or sickness that makes her unable to take care of the child.

## C. SICKNESS LEAVE AND DISABILITY LEAVE

In the event of the employee's sickness and/or an accident that causes a work incapacity, it is necessary to have the incapacity certified by a licensed practitioner or the competent authority, normally chosen by the employee, that clearly establishes the days required for the employee to recover and return to work.

Sickness leave is considered a valid cause of absence and is therefore paid under Colombian law. The remuneration during sickness depends on the origin of the disease or accident and is assumed as follows:

Professional sickness and/or work accident: professional sickness and/or work accident remuneration is assumed by the social security subsystem in labor risks on a base of 100% of the employee's salary during the entirety of his incapacity to work.

**Regular sickness and/or regular accident:** (i) During the first 2 days of sickness leave, the employer must assume and pay 100% of the employee's salary. (ii) Between the 3rd day and the 90th day, the payments are assumed by the social security subsystem in healthcare under a base of 66% of the employee's salary. (iii) Between the 91st and 180th day of work-incapacity the payments are assumed by the social security subsystem in healthcare under a base of 50% of the employee's salary. (iv) After the 181st day and until day 360 of work incapacity, the payments are assumed by the social security subsystem in pensions under a base of 50% of the employee's salary. (v) After day 360, the payments are assumed by the social security subsystem in healthcare under a base of 50% of the employee's salary. In any case, the benefit can be lower than the mandatory minimum wage. Even though after the third day of sickness leave all benefits in money are assumed by the social security system, the law requires that the work incapacities between day 3 and day 180 must be paid by the employer, granting the faculty to the employer for a reimbursement from the social security system.

These same rules also apply to disability leave.

## D. DISABILITY LEAVE

The same rules as clause 'c.' above apply.

## E. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

- **Required**

**Trade union leave:** Trade unions are normally entitled to special paid leaves assumed by the employer, for some of their members to perform activities related to the organization and accomplishment of the trade union interests. This paid leave(s), its rules for recognition, length and other special requirements are normally defined in the collective bargaining agreement.

**Voting leave:** employees are entitled to paid leave for purposes of voting in public elections (1/2 a day of paid leave) and for mandatory jury duty obligations (1 day of paid leave).

**Mourning leave:** a period of 5 days of paid leave must be granted to employees in case of the death of certain relatives, as defined by law.

**Burial leave:** employers are obliged to grant the necessary leave for his employees to assist with the burial of their co-workers.

**Compassionate leave:** while Colombian labor law mandates the obligation for employers to grant his employees with a paid compassionate leave, it does not define its scope or length. Employers are recommended to analyze on a case-by-case basis, the conditions to grant, and the length of, a compassionate leave.

- **Typically Provided**

Employment contract suspension: the employment contract can be suspended for specific causes, as defined by law. One such cause offers a general possibility for the parties to suspend the employment contract on mutual consent. This specific situation is commonly used by employers to grant his employees non-paid leave for personal reasons.

**Garden Leave:** as previously mentioned, the employer can prevent his employees from attending to their work, but the obligation to pay their salary, as if it was a unilateral paid leave, remains. However, this option is prohibited whenever the employee has to receive unilateral paid leave, per the employer's request, which may lead to discriminatory measures against the employee, or could potentially subject the employee to harassment.

## 4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Pensions are recognized under three different circumstances: Old age, invalidity and survivorship. Its amount is normally recognized by the social security system prior to the achievement of some specific requirements by the affiliate. The

labor risks subsystem only recognizes pensions in circumstance wherein the origin of said benefit is related to a work-related accident or disease.

**Old Age Pension:** as Colombia shares a private/public scheme for pensions, the requirements for old age pensions differ from the elected scheme by the employee. In the public scheme, the requirements for an old age pension are related to age (62 for men and 57 for women) and a defined minimum amount of contributions (1300 weeks). For the private scheme, the requirement for the pension depends exclusively on the affiliate's savings in his mandatory account. No special pension plans for the private sector are allowed, as they were eliminated and prohibited under the Legislative Act 001 of 2005.

Employees who perform activities that, by law, are considered high-risk activities, are entitled to benefit from more gracious conditions to access an old age pension, but that also means that the employer has an obligation to make additional contributions to the subsystem.

**Invalidity Pension:** this is reserved for employees that suffer a permanent disability of more than 50% percent of his work capacity, evaluated by the competent authority. The total amount of the pension is assumed by the social security system.

The recognition of the old age pension or the invalidity pension is considered as a fair cause to terminate the employment contract, without the right of recognition of any severance pay.

## 5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

In addition to the monthly salary, the employer is mandated to recognize the following benefits in money for his employees:

- a 30 days' allowance paid annually (or pro rata) divided into two payments as follows: 15 days in June and 15 days before 20th of December.
- a 30 days' allowance (or pro rata) as a saving for the employee in case he is unemployed. This payment is not recognized directly to the employee, but to a specialized Company which

saves this amount and will only disburse it to the employee under circumstances defined in the law.

- a 12% interest rate (or pro rata) over the allowance mentioned in the last paragraph. This interest is recognized directly to the employee.
- a transport allowance paid monthly for employees who earn up to two (2) times the minimum wage. The amount of the allowance is defined, annually, by law.
- a pair of shoes and a working dress must be provided every 4 months for employees who earn up to two (2) times the minimum wage. The right to this benefit is only available to employees, under contract, after 3 months.
- in addition, the law establishes special benefits for certain economic sectors (i.e. the oil and mining sector).

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# LOPEZ & ASOCIADOS ABOGADOS

## COLOMBIA

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