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ALLENDE & BREA

EMPLOYMENT LAW OVERVIEW

ARGENTINA 2019-2020

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I. GENERAL OVERVIEW

1. INTRODUCTION

Labor laws are very comprehensive and rule almost every term of the employment relationship. Labor laws are public policy and therefore, are mandatory. The employer is obliged to grant employees at least what is provided by labor laws. Therefore, an employer can grant employees benefits on top of what is provided by those laws, but cannot agree with employees in detriment of what is provided by those laws, nor can an employee waive any right included in those laws.

2. KEY POINTS

- Argentina labor laws are pro employee, designed to protect the rights of employees and workers, by setting rules governing working conditions and working hours, providing for payment of salaries during illnesses, setting surcharges on salaries for overtime, establishing annual vacations, and requiring the payment of severance compensation in the event of unfair dismissal (dismissal without justified cause).
- Argentine labor law is comprised of public order rules and thus cannot be ruled out, or waived by any agreement, or applicable law, or jurisdiction clauses eventually included in any agreements. Therefore, Argentine labor law will apply -and labor courts will have jurisdiction- in respect of any eventual labor court claim filed in respect to work performed in Argentina.
- Employees are entitled to a 13th salary or statutory annual bonus, called "aguinaldo" or "sueldo annual complementario/SAC". It is payable in two semi-annual installments, falling due on June 30 and December 18. Each installment is equal to 50% of the highest monthly salary accrued during the corresponding semester.
- Employers must pay a compulsory life insurance for all employees.
- The employer can only change the terms and conditions of the labor employment, provided that those changes are not unreasonable and do not either:
  - Modify the essential terms of the employment contract; nor
  - Cause material or moral damages to the employee.

3. LEGAL FRAMEWORK

- Labor Laws are federal laws, so the labor terms and conditions are nationally standardized.
- A general Employment Labor Law 20,744, complemented by additional laws and any applicable collective bargain agreement, governs employment conditions.
- The Health Insurance Act, law No. 23,660 sets forth the requirements for granting proper health service to employees and their family.
- Employees' Pension and Retirement Act, law No. 24,241, establishes the access to public funds for employees and independent workers who are eligible to apply for retirement or a pension plan, retirement for disability and pension coverage in case of death.
- The Occupational Health and Safety at Work Law No. 19,587 regulates the conditions of health and safety at work applicable to all establishments regardless the nature of their economic activity.
- Working Hours Act. No. 11.544/1929 regulates working hours.
- Law No. 24,013 regulates temporary personnel service companies and applicable fines for improper registration of labor relationships.

4. NEW DEVELOPMENTS

Decree 1043/2018, published on November 13, 2018, provides that up to March 31, 2019, employers in Argentina must follow a procedure before dismissing, without justified cause, employees hired under an indefinite term employment. The employer must serve notice of that dismissal upon the Ministry of Production and Labor of Argentina no less than 10 business-days before the dismissal becomes effective.

The Ministry of Production and Labor of Argentina may, either on its own initiative or at the request of any of the parties, request the employer and the employee, together with the proper union counseling, to attend, during that 10 day legal term, at as many hearings as it may deem necessary to discuss the conditions for the future dismissal. Breach of this obligation may entail the imposition of the penalties that may range between 25% up to 200% of the minimum mandatory wage, that as from December 1, 2018 is AR$ 11,300, currently equal to US$290.

In October 2018, a Labor Court ordered several bus companies to hire at least 30% of female bus drivers. This percentage was determined in accordance with the quota provided by union laws for female union delegates.

In July 2018, the Ministry of Labor applied a USD 29M fine (one of the highest fines ever) to the truck-drivers' union (one of the strongest unions in Argentina) based on the fact that the union had not fulfilled the mandatory conciliation procedure and continued to protest after the labor authorities had called both parties to a mandatory conciliation procedure. The union filed an appeal against the fine and the Labor Court ratified the fine, though reduced it, ruling that the fine should only be calculated considering the union members that actively participated in the protest and not the total number of union members.

II. PRE-EMPLOYMENT CONSIDERATIONS

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

A foreign employer needs to establish a local entity to hire an employee, in order to register the employee before the local tax authorities and pay local taxes and social security obligations.

2. LIMITATIONS ON BACKGROUND CHECKS

In Argentina, an employer cannot perform a criminal background check on an employee, either directly by the employer or by the use of a vendor. Only the employee can obtain the criminal background and then provide it to the employer. This is established in section 8 subsection (f) of the Criminal Records Register Act (Law No. 22,117) which states that the Criminal Records Registry will be confidential and may only provide reports to: (i) the individuals who, by demonstrating the existence of a legitimate interest, request a criminal certification. Moreover, the Regulatory Decree No. 2004, states that the certificate must be requested by the interested party personally or through his legal representative. In addition, the Argentine Data Protection Act establishes that personal data referring to criminal records can be processed only by the competent public authorities.

3. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Employers cannot include restrictions on application that may entail any discrimination, such as gender, age, political or religious beliefs and/or marital status. Potential employees are not obliged to provide background information due to the fact that it is considered personal private information. The employer is obligated to conduct pre-employment medical examinations to determine if the employee is fit to work and to determine any prior health conditions at the beginning of the labor relationship.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

Written employment contracts are not required for permanent, full-time employment relationships, because labor laws are mandatory, very comprehensive and rule almost every term of the employment relationship. Labor laws only require the employer to register the employee in the company labor books and before the tax authorities, pay social security and taxes in respect to all salaries payable to the employee, and prepare and deliver to the employee the correspondent salary slips on a monthly basis. Employers must also provide for mandatory life insurance as well as working accident insurance for all employees.

2. FIXED-TERM/OPEN-ENDED CONTRACTS

For a fixed-term contract:

- a written employment contract must be executed;
- it requires an extraordinary need that duly justifies executing a fixed term contract
- there is a maximum term of 5 years;
- the employer must serve prior notice of termination (no less than 1 month and no more than 2 months). Failure in serving such notice cannot be replaced by any compensation and will automatically transform the contract into an indefinite term contract;
- in case the employer dismisses an employee without justified cause before the expiration of the agreed term, the employee is entitled to claim damages. Labor Courts have usually awarded pending wages until the original expiration of the agreed term;
- once the agreed term finalises, the employer must pay a severance compensation equivalent to 50% of a regular one; and a fixed term contract has no trial period.

A temporary contract can be used when extraordinary and transitory production demands or requirements are foreseeable, although a specific term for the contract termination cannot be foreseen. The contract will also take place when the relationship begins and ends with the specific job execution or with the specific service for which the employee was hired to execute. The guidelines required by law are:

- there is no obligation to give any notice of termination;
- no severance payments or compensations are owed when the contract finishes;
- a written contract is required by law;
- the specific cause must be clearly described, as the employer must prove the temporary nature of the contract;
- no trial period is applicable;
- Law 24,013 caps the term of this contract to a maximum term of 6 months per year and up to 12 months on a 3 year period; and
- it can be either provided directly by the employer or through an employment agency authorised by the Ministry of Labor. In this last case, the company is jointly and severally liable with the employment agency for any labor and social security debts in connection with the employee hired through an employment agency, including payment of severance compensation.

3. TRIAL PERIOD

Trial periods can be up to 3 months for indefinite term contracts. Termination during the trial period can be decided without paying any compensation or severance payment liability for the employee (except that a 15-day prior notice and the wages are due).

4. NOTICE PERIOD

Employers must give a prior written notice to the employee in the event of a termination of employment with no justified cause. Such prior notice must be given by the employer: (i) 15 days in advance, if labor contract is under the trial period; (ii) 1 month in advance, if employee has served for up to 5 years; and (iii) 2 months in advance, if employee has served for more than 5 years. Employer has the option not to not give such prior notice, in which case it must pay severance compensation in lieu of notice, equal to 15 days salary, one or two monthly salaries, depending each case. It is custom that employers opt to pay this compensation instead of giving prior notice.15 days prior notice is provided to be given by the employee to the employer in case he will resign to his/her job, without detriment of his seniority. Decree 1043/2018, published on November 13, 2018, provides that up to March 31, 2019, employers in Argentina must follow a procedure before dismissing, without justified cause, employees hired under an indefinite term employment. The employer must serve notice of that dismissal upon the Ministry of Production and Labor of Argentina no less than 10 business-days before the dismissal becomes effective.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

Employees are entitled to a minimum wage that is adjusted from time to time. As from December 1, 2018, the minimum mandatory wage is AR$ 11,300, currently equal to US$ 290. It will increase to AR$ 11,900 (U$S 305) in March 2019 and up to AR$ 12,500 (US$ 320) in June 2019.

However, the minimum wage is higher for employees under collective bargaining agreements, which are also granted periodic salary increases agreed upon by unions and industry chambers. Part time workers and internship can be paid less salary, provided that they comply with the legal requirements set forth for those relationships.

Employees are entitled to mandatory health coverage and pension plan (funded through mandatory social security contributions by both employer and employee), paid vacations, 13th salary and maximum working hours. They are also entitled to paid sick leave. There are other compulsory leaves of absence on the grounds of childbirth, marriage, mourning or educational examinations. Applicable collective bargain agreements also provide additional pay leaves.

2. SALARY

A minimum wage has been established and is adjusted at intervals. However, said minimum wage is generally exceeded by the basic salaries established in the collective bargaining agreements. Collective bargaining agreements are negotiated by unions with the chambers that represent employers of each industry. The provisions of a particular collective bargaining agreement are mandatory by law and regulated by law. A particular collective bargaining agreement is applicable to all employees working in activities such as industrial, commerce, health, and others. In general, employees who work as managers, supervisors or other hierarchy positions are excluded from the legal framework of the collective bargaining agreement. The consent of the employee is not necessary since they are automatically included in the collective bargaining agreement just for working in a company under a particular collective bargaining agreement. Collective bargain agreements usually provide benefits to employees on top of what is provided for by Mexican employment and labor laws.

3. MAXIMUM WORKING WEEK

The normal working hours for employees and workers are limited to 8 per day or 48 per week. Night shift and unhealthy work provide reduced working hours.

4. OVERTIME

Overtime is paid at a rate of 50% of the normal pay, unless it is worked on Saturdays after 1 P.M., Sundays and holidays, in which case it is paid at a rate of 100% of the normal pay. Applicable Collective Bargain Agreements may provide higher payments. Overtime must not exceed 3 hours per day, 30 hours a month and 200 hours a year. All employees are entitled to overtime payment, except corporate directors or corporate managers registered as such before the Office of Corporations (Register of Commerce). Part time employees cannot perform overtime work.

5. HEALTH AND SAFETY IN THE WORKPLACE

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

Employers are obliged to grant mandatory life insurance and working accident insurance to employees. Employers are also obliged to provide a healthy and safe workplace (both physical and psychological), in compliance with the labor authorities' instructions, as well as the working insurance instructions. Employers, in certain industries, must provide employees clothing working tools and protection equipment, as well as have preventive actions to prevent accidents, and regular medical examinations.

B. COMPLAINT PROCEDURES

Employees may file a petition before the union and/or the labor authorities complaining about the breach of health and safety obligations by employer. The labor authorities may inspect the workplace at any time and order the employer to remedy any breach and impose fines.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

Labor Law 20,744 as well as Law No. 23,592 and international treaties entered by Argentina prohibit discrimination. If an employee is discriminated against because of race, religion, age, gender, disability or political or union activities, the employer's action can be declared null or void and the employer can be ordered to both reinstate the dismissed employee and compensate the employee for any damages caused. As far as labor conditions are concerned, the law obliges the employer to give the same benefits/salary to employees within the same category and seniority.

2. EXTENT OF PROTECTION

Different conditions granted by the employer to the employees must be justified in objective parameters (seniority, job position, responsibilities and performance). The employer is obliged to keep a safe working environment, including preventing and protecting employees against physical and psychological damages caused by discrimination. The employer could not only be ordered to protect an employee, but can also be held liable for any damages suffered by the employee due to discrimination.

3. PROTECTIONS AGAINST HARASSMENT

The employer is obliged to keep a safe working environment, including preventing and protecting employees against harassment. The employer could not only be ordered to protect the employee but can also be held liable for any damages suffered by employees due to harassment.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Employers are obliged to provide reasonable access to disable employees, such as employees in wheelchairs.

5. REMEDIES

Employees that are discriminated against can claim unequal treatment, claiming payment of salary differences or to be granted the same benefits. In case of termination due to discrimination the employee is entitled to claim tort damages and even reinstallation at work and that the discriminative act is declared null and void.

Additional severance is provided for dismissed employees recently married or pregnant. Union delegates cannot be dismissed while they hold office and for one year thereafter. In the case of dismissal, the union delegate may claim the reinstatement or consider himself/herself dismissed in a constructive basis and claim payment of severance compensation plus pending salaries until the expiration of his period, plus additional severance equal to 13 salaries.

In case of dismissal of a sick employee, employees can either claim reinstatement or be paid severance compensation, plus the pending salaries until the expiration of the paid sick license, plus tort damages.

6. OTHER REQUIREMENTS

In recent case law, a labor court ordered a transportation company to hire at least 30% of female bus drivers. This percentage was determined in accordance to the quota provided by union laws for female union delegates.

VI. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

Employers can restrict the employees' Internet use and/or social media use during working hours, instructing employees that it can only be used for labor purposes.

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

Employers can monitor, access and review only labor/corporate employees' electronic communications, provided that the employee is notified in advance (by signing a corporate policy in that respect) that the electronic communications are to be used only for working purposes and can be monitored and therefore, the employee should have no expectation of privacy.

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

Provided that the employees have signed a copy of the company´s policy for the use of social media and provided that employer can prove the employee´s breach and the damage to the employer, employees that do not follow the social media policy can be subject to disciplinary sanctions. Employees that divulge confidential information can also be subject to disciplinary sanctions or dismissed with justified cause, depending the seriousness of the fault and the seniority and prior sanctions of the employee.

VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

There is no restriction regarding the employment of foreigners in Argentina. Requirements differ if the employee´s nationality is from a country of Mercosur or affiliated to Mercosur (Uruguay, Paraguay, Brazil, Argentina, Colombia, Chile, Venezuela, Ecuador, Bolivia and Perú) or other countries. Employees that are not nationals of a country member of the Mercosur, or affiliated to Mercosur, are required to obtain a working visa to work under an employment relationship in Argentina. Employers must first register before a registry of employers that hire foreigners. In order to obtain a working visa, the employee should be registered as an employee of a local company in Argentina. All foreigners have to file a criminal records certificate dully legalized from the country or countries where they have been living in the last 3 years as well as from Argentina.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

Employers can terminate employment at any time without justified cause, subject to payment of severance compensation provided by labor laws. Employees on a trial period, i.e. during the first three months of employment, are not entitled to severance compensation, exception made to prior notice (15 days). Termination of employment with justified cause does not entail payment of severance compensation.

The employer can dismiss an employee with justified cause in the event of failure of the employee to fulfil his obligations which, by their gravity, do not consent to the continuation of the relationship. Labor laws do not list specific breaches that justify dismissal and should be analyzed on a case by case basis. The employer has the burden of proving the cause of dismissal. The employee can also challenge any dismissal with justified cause decided by employer, in which case a Labor Court will decide if the employer had a justified cause for dismissal. Labor Courts are very restrictive at the time of evaluating if the cause dismissal meets the legal standards in order to be considered justified. Labor Courts usually analyze if employee has prior disciplinary sanctions also provided by labor laws, the employee´s seniority and hierarchy.

An employee can also resign, in which case, no severance compensation is payable. The employee can consider himself dismissed in constructive basis due to a breach of employer, by its gravity, do not consent to the continuation of the relationship, in which case a Labor Court will decide if the employee had a justified cause for constructive dismissal. Lastly, employment can terminate due to the fact that the employee retires at the time he/she is granted the governmental pension plan. No severance compensation is payable in that case.

2. COLLECTIVE DISMISSALS

The company has to go through a mandatory conciliation procedure before the Ministry of Labor prior to dismiss a certain minimum number of employees provided in Law 24,013, as described above:

- When the company has less than 400 employees and the company will dismiss more than a 15% of the total payroll;
- When the company has between 400 and 1,000 employees and the company will dismiss more than a 10% of the total payroll;
- When the company has more than 1,000 employees and the company will dismiss more than a 5% of the total payroll.

3. INDIVIDUAL DISMISSALS

Employer can terminate employment at any time without justified cause, subject to payment of severance compensation provided by labor laws.
Union delegates are protected and therefore, cannot be dismissed during their term and one year afterwards. In case of dismissal of pregnant or married employees or sick employees, among other cases, additional severance compensation is payable.

Employers have to serve notice of termination in written and through a notary public or certified letter of all dismissals. Resignation has to be made in written and the employee has to send a telegram from the official postal company (Correo Argentino).

A. IS SEVERANCE PAY REQUIRED?

In case of termination of employment without justified cause, the employer must pay the employee mandatory severance compensation provided by law within 4 days after serving notice of termination, as follows:

Seniority compensation: equivalent to the best monthly salary for each year of employment or period exceeding 3 months, taking as a basis the best monthly, regular and ordinary salary, accrued during the last working year. Such basis has a maximum ceiling amount provided by the applicable bargaining agreement (3 times the average of all wages provided by such collective bargaining agreement) and a minimum cap amount (one employee's gross monthly salary). The Supreme Court ruled that said ceiling must not imply a reduction of more than 33% of the best monthly salary basis.

Compensation in lieu of notice: The employer must give a prior written notice to the employee in the event of a termination of employment with no justified cause. Such prior notice must be given by the employer: (i) 15 days in advance, if the labor contract is under the trial period; (ii) 1 month in advance, if the employee has served for up to 5 years; and (iii) 2 months in advance, if employee has served for more than 5 years. If the employer does not give such prior notice, it must pay this severance compensation in lieu of notice, equal to 15 days salary, one or two monthly salaries, depending each case. It is custom that employers opt to pay this compensation instead of giving prior notice.

Pending days till the end of the month: If the dismissal does not take place in the last day of the month, the employer must pay a compensation equal to the proportional salary for the pending days to complete the entire month in which the dismissal took place.

Compensation for unused vacations: The employee is entitled to compensation equal to the vacation pay in proportion to the days effectively worked of the year in which the dismissal took place.

Statutory Annual Bonus: The employee is entitled to the proportional amount of this 13th salary.

The severance compensation is reduced by one half if the labor relationship ends as a result of the employee's death. Additional severance (equal to 13 monthly salaries) must be paid in case of termination without justified cause of a pregnant employee (during pregnancy and up to 7.5 months after giving birth) or an employee that has been married (and is fired within 3 months prior to the marriage or 6 months after the marriage). If the employee is dismissed during her or his paid sick leave, the employee is entitled to claim the months remaining to complete the paid leave provided by law plus moral damages. The employee may claim payment of certain labor fines provided in his/her favor that may significantly increase the severance payable, in the event he/she proves his labor relationship or salary was not duly registered.

4. SEPARATION AGREEMENTS

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

No separation agreement is required. The advantages of a separation agreement should be analyzed on a case by case basis, depending on the amount to be paid to the employee and the employer´s exposure. In certain occasions, it is best practice to attend to the Ministry of Labor after termination of employment to sign a settlement agreement to be approved by such authority, which is the only binding agreement (res judicata) and valid waiver according to local labor laws. Any other agreement will not preclude the employee to collect any amount and file a claim (even if a waiver provision is included), in which case, any amounts paid in connection with the agreement, may be offset in against eventual amounts awarded by a court.

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

Both parties must attend to the Ministry of Labor counseled by a lawyer. A settlement payment should always be included, without acknowledging

any facts or rights and subject to the prior approval of the agreement by the Ministry of Labor. A confidentially provision, as well as a broad waiver, are also standard. Lastly, a provision stating that the amount payable due to the separation agreement should be offset against any eventual future claim or amount awarded to the employee by a court.

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

In principal the age of the employee does not make a difference, but when employees reach 70 years old and have 30 years of contributions to the social security system, the employer is entitled to demand the employee begin the process to obtain retirement and the governmental pension plan. The employer must serve notice to the employee of these circumstances and demand the employee to start the process. The employer must also deliver previously to the employee the labor certificates and verify that the employee is eligible for retirement.

Once the employer has served notice and deliver the labor certificates, the employer is obliged to maintain the labor relationship with the employee (and pay salaries and all benefits) until either the employee obtains retirement, or for a period of one year since the employee was served notice (whatever occurs first). Once the employee obtains retirement or the one year period has expired (whatever occurs first), the employer is entitled to terminate the employment relationship due to retirement of the employee, without paying any severance compensation to the employee.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

In some cases, parties agree that (i) the employee returns all work equipment or tools of the company; (ii) the employee resigns to any board of directors or legal representative position; (iii) the employer pays employee medical coverage for a limited period of time after termination; (iv) the employer pays proportional bonus or stock option; (v) the employer transfers the company´s car to the employee; (vi) the employee returns the company´s car; and/or (vii) no compete provisions.

5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

The employee can challenge dismissal with justified cause by claiming payment of severance compensation for dismissal without justified cause plus a fine in his favor equal to 50% of that severance compensation (plus interest and legal fees), in which case a Labor Court will decide if the employer had a justified cause for dismissal. The employer has the burden of proving the cause of dismissal.

The employee can also claim payment of severance differences alleging that the severance compensation was not properly calculated, as well as certain fines provided in his/her favor for improper registration of salary or entry date, in which case a Labor Court will decide if the employer correctly paid salaries and severance compensation as well as properly registered the employee´s labor relationship and salary.

The employee must go through a mandatory conciliation procedure prior to filing a court claim. Parties must attend hearings before a conciliation appointed by the Ministry of Labor to explore a settlement.

6. WHISTLEBLOWER LAWS

Argentine criminal laws provide reduction of penalties for whistleblowers in respect to crimes against the public administration (corruption and fraud against public administration), customs criminal offenses, economic and financial crimes, drug trafficking, terrorism, human trafficking and money laundering, among others. These laws also provide a reduction of penalties to be imposed on companies for crimes committed by their employees or officers, provided that the company has set forth a compliance policy that includes, among others, the company´s protection to whistleblowers against retaliation.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

During the employment relationship, employees are obliged in respect to employer´s intellectual property, confidentiality and no competition. There are no specific laws about restrictive covenants after termination of employment. However, the Constitution provides freedom of work, which means that the employee may challenge any non-compete or non-solicitation provisions after termination of employment.

2. TYPES OF RESTRICTIVE COVENANTS

A. NON-COMPETE CLAUSES

The employee is obliged by labor laws not to compete with employee during the labor relationship. Labor Courts have ruled that non-compete provisions after termination are only permissible if they are limited in time (maximum 2 years, in exceptional cases can be exceeded) and compensated (at least 50% of monthly salary approx.). Failure to follow these requirements will turn a non-compete provision null and unenforceable.

B. NON-SOLICITATION OF CUSTOMERS

The employee is bound during the labor relationship. After termination, it will be analyzed as a non-compete provision as mentioned before.

C. NON-SOLICITATION OF EMPLOYEES

Non-solicitation of employees in unenforceable in Argentina due to the employee´s constitutional right of freedom to work.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS—PROCESS AND REMEDIES

Non-compete or non-solicitation of customers covenants after termination of the labor relationship must comply with specific requirements to be enforceable. The provision should be limited in time (maximum 2 years), compensated (at least 50% of monthly salary approx.) and clearly outlined the geographical and industry/companies scope.

4. USE AND LIMITATIONS OF GARDEN LEAVE (DEFINITION AND APPLICABILITY)

Labor laws have no specific provision regarding garden leave. Employers cannot force employees to take garden leave (paid leave), since the employer is obliged to give work to the employee. However, the employee can accept the garden leave, in which case the employee must be paid his salary and benefits in full, as if he was working.

X. TRANSFER OF UNDERTAKINGS

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

In case of a transfer of undertaking, employees are transferred as a matter of law, and consent of the employees is not required, and no notice is required. The new employer must maintain the employee's work category, benefits, rights, salaries and seniority acquired with the prior employer or the terms of employment may change only for the benefit of the employee. All liabilities of the in-scope employees transfer automatically to the new employer. The employee may consider himself dismissed in constructive basis, by reason of the transfer, if the terms of employment are changed to the detriment of the employee or he suffers any damage due to the transfer.

In case of assignment of personnel that does not entail a transfer of undertaking, the employee must give his/her prior written consent and the new employer must maintain the employee's working conditions. All liabilities of the in-scope employees transfer automatically to the new employer, as in the transfer of undertaking.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

The prior employer will be jointly liable with new employer for any labor and social security debts arising out of the employment before the date of transfer. The new employer becomes solely liable for those debts generated after the transfer. There is no legal obligation to inform, consult or require authorization of trade union/employee representatives or labor authorities.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

In Argentina, there are currently trade unions and employers' associations that represent all types of activities. Employees have the right to organize themselves into unions. Affiliation to unions by employees is not mandatory. The employee is free to decide whether to affiliate or not to the union. The Government grants official recognition only to the most representative union. This is the only union that can represent the employees in collective bargaining agreements.

Union delegates are protected by law. They cannot be demoted, sanctioned, suspended, changed the terms and conditions of employment in their detriment, nor dismissed without justified cause while they act as delegates and until one year after their term expires. In order for an employer to apply a disciplinary sanction, suspend or dismiss with justified cause a union delegate during the protection term, the employer must seek the prior authorization of a labor court. The same protection is granted to employees that run as candidates for union delegates but are not elected and until 6 months after the election.

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

Argentina has ratified ILO Convention # 87 that establishes that workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing. It also provides that workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom and to organize their administration and activities. It also sets forth that workers' and employers' organizations shall have the right to establish and join federations and confederations and any such organization.

Section 14 bis of the Argentine Constitution provides that the Government must guarantee free and democratic unions and that unions have the right to execute collective bargaining agreements, file conciliation procedures and call a strike.

Law 23,551 provides freedom of association right to unions, the right to organize, meet, file petitions to the authorities, freedom of affiliation for workers, requirements for union delegates, minimum union delegates per company and protection of union delegates. It also provides that the union that has been granted official recognition by the government as the only one that can represent the employees and engage in collective bargaining agreements.

Union delegates from the union that has been granted official recognition by the government are protected by this law. They cannot be demoted, sanctioned, suspended, changed the terms and conditions of employment in their detriment nor dismissed without justified cause while they act as delegates and until one year after their term expires. In order for an employer to apply a disciplinary sanction, suspend or dismiss with justified cause a union delegate, the employer must seek the prior authorization of a labor court. In case the employer breaches this protection, the union delegate may claim his reinstatement or payment of severance compensation for dismissal, payment of pending salaries until the expiration of his term, plus moral damages and additional severance equal to 13 monthly salaries. The same protection is granted

to employees that run as candidates for union delegates but are not elected and until 6 months after the election.

3. TYPES OF REPRESENTATION

A. NUMBER OF REPRESENTATIVES

Law 23,551 provides the minimum number of union delegates in respect to the employees of the company:

- from 10 to 50 employees: 1 union delegate.
- from 51 to 100 employees: 2 union delegates.
- more than 101 employees: an additional representative every 100 employees.

Applicable collective bargain agreements may provide a higher number.

B. APPOINTMENT OF REPRESENTATIVES

The union delegates are chosen by free and democratic vote of all employees, affiliated and non-affiliated. 30% of the candidates must be women. Unions must inform the employer of the name of the candidates that will run as candidates as well as the one that is elected.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The main tasks of the union delegate are: (i) to represent and make petitions representing individual workers; (ii) to verify compliance of labor laws and collective bargain agreements in respect to workers; (iii) to participate in any inspection carried on by the labor authorities; (iv) to organize and conduct meetings; (v) to educate and instruct individual workers.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

Management can organize their own union, separate from the union of non-management employees

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Labor Laws also allow the existence of other unions that are not officially recognized as the most representative union (referred to as "simply registered unions" before the Ministry of Labor) and therefore, cannot represent the employees in collective bargaining agreements. They can represent employees in other collective claims and file petitions to the labor authorities alleging employer´s breaches to labor laws. The Supreme Court and Labor Courts have ruled that the union delegates of simply registered unions are also protected against demotion, sanctions, suspensions, change of the terms and conditions of employment in their detriment and dismissal without justified cause.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

All employees are covered by a national retirement pension scheme funded through mandatory contributions by both employer and employee. It is paid by the employee through withholdings of their gross salary and by the employer through fixed contributions, with each calculated as a percentage of the employee´s salary. Employees are eligible for retirement and collect governmental pension when they reach retirement age (65 years for men and 60 years for women) and have made contributions to this system for 30 years. Employers can only demand employees to obtain retirement when they reach 70 years old and have made contributions to this system for 30 years.

2. HEALTHCARE AND INSURANCES

Health care schemes exist for all employees, entitling them to free medical treatment and hospital care. These are funded through employer contributions and employee withholdings, both a percentage of the employee´s salary. Employers must obtain a mandatory insurance that covers the employee's death, illness or disability in connection to work. Employers must engage insurance contracts through authorized insurance companies. Such entities are obliged to provide financial and medical assistance to the injured employees. For this provision and coverage, the employer must pay a monthly contribution. Only the accidents in connection with labor duties and a restricted list of occupational diseases are covered by this insurance. During the insurance assistance, the worker is entitled to receive medical assistance and medications, prostheses and orthopedic items, if required. Burial expenses are also included. The employer must also provide mandatory life insurance for his employees, payable by the employer through monthly contributions. Keep in mind that applicable collective bargain agreements might set forth other additional insurances.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

Employees are entitled to an annual paid vacation period. Vacations are compulsory and the employer must grant them between October 1 and April 30 as follows:

- up to 5 years of service: 14 calendar days.
- between 5 and 10 years of service: 21 calendar days.
- between 10 and 20 years of service: 28 calendar days.
- over 20 years of service: 35 calendar days.

The parties may always agree to a longer period than the one provided by law but may not agree on a shorter period.

National holidays must be observed, and the corresponding salary should be paid twice whenever services are actually performed during those days.

B. MATERNITY / PATERNITY LEAVE

Female employees are entitled to 90 days' paid maternity leave. This is usually taken in the 45 days before giving birth and the 45 days afterwards. However, the employee can instead choose to take 30 days' leave before giving birth and 60 days' leave afterwards. Leave is paid by the social security system as a family allowance. Female employees can request additional unpaid leave between three and six months. While a newborn baby is breastfeeding, a female employee can take two half-hour periods a day to feed her baby, for up to one year after the birth. Paternity leave is 2 days.

C. SICKNESS LEAVE

In the event of sickness leave or injury related to work, the employer must pay the employee's salary

for the first fifteen days. After the fifteenth day, the working insurance company will pay the sick leave to the employee. In respect to accidents or illnesses not related to work, employees that have served for up to 5 years are entitled to 3 months of paid sick leave. If the employee has a family, the paid sick leave is 6 months. For those employees that have served for more than 5 years, the paid sick leave is 6 months and if the employee has a family, the paid sick leave is 12 months. These paid sick leaves, since they are not related to work, are not covered by any insurance nor by the government, and are paid by the employer. The employer is entitled to demand the employee to attend to a medical doctor, appointed by employer, to verify that the employee is actually ill and in no condition to work. Once the paid sick leave term has elapsed, in case the employee is not able to return to work, the employer is obliged to keep the employee on its payroll as in leave, but without paying any salary to him/her for up to twelve more months.

D. DISABILITY LEAVE

In the event of sickness leave or injury related to work, employers must pay the employee's salary for the first fifteen days. After the fifteenth day, the working insurance company will pay the sick leave to the employee. In respect to accidents or illnesses not related to work, once the paid sick leave term has elapsed, in case the employee is not able to return to work, the employer is obliged to keep the employee on its payroll as in leave, but without paying any salary to him/her, for up to twelve more months. In case that, during that term, the employee has a permanent disability making him/her unable to perform the same work, the employer is obliged to give him/her work in accordance with his disability. If the employer can prove that he is not able to provide the employee with work in accordance with the employee's disability, the employer can terminate the employment by paying 50% of the severance compensation provided for in dismissal without justified cause. In case of total permanent disability, the employer must pay 100% of the severance compensation provided for in a dismissal without justified cause.

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

Labor laws also provide leaves of absence on the grounds of marriage (10 days), mourning (3 days) or educational examinations (2 days per exam and up to 10 days per year). Applicable collective bargain agreements usually provide for other leaves or additional days to these leaves.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Employees are entitled to collect a mandatory pension when they reach retirement age (65 years for men and 60 years for women) and have made contributions to this system for 30 years. Employers can only demand employees to obtain retirement when they reach 70 years old and have made contributions to this system for 30 years.

5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Employees under a collective bargain agreement for commercial activities are entitled to a retirement insurance.

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