

# **Mexican Federal Labor Law Reform: What Companies Doing Business in Mexico Need to Know**

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Mexico's new Federal Labor Law (FLL) took effect on December 1, 2012. The reform seeks to modernize Mexico's labor law. The new FLL's major, employment related amendments include increased regulation of outsourcing jobs, increased flexibility in hiring and payment of wages, the addition of the concepts of diversity, nondiscrimination and anti-harassment, and parental leave rights.

Previously, companies entering Mexico would set up two entities, one of which would be used to outsource employment to avoid paying worker benefits, including avoiding Mexico's mandatory 10% employee profit sharing requirement. Now, among other requirements, employers may only outsource employees if the outsourced employees perform work of a specialized character. In other words, under the new FLL, companies will need to evaluate the way they are structured or risk paying all employees (outsourced or otherwise) all employment related liabilities (such as notice requirements, severance payments, profit-sharing and social security).

## **Outsourcing and Profit-Sharing**

The Mexican Labor Law has a mandatory requirement whereby employers must share 10% of their profits with employees. To mitigate this requirement, companies have traditionally set up two separate entities in Mexico: one to run the business with limited employees and the other one to hire and lease out employees to the business. The new FLL puts companies who follow this traditional set-up at risk of having to provide the leased employees 10% of its profits, along with satisfying all other labor law obligations, because very few will qualify as valid outsourcing agencies.

Under the FFL, for outsourcing to be valid, it must meet the following terms and conditions:

1. It may not cover all the activities carried out in the workplace,
2. It must be limited to specialized tasks that fall outside of the beneficiary's ordinary course of business and thus, justified by its specialized nature,

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3. It may not include tasks that are the same or similar to those being performed by the beneficiary's employees, and
  4. It must be documented through an outsourcing agreement.

If these conditions are not met, the beneficiary may be deemed a co-employer of the outsourced employees and, as a result, may be obligated to pay associated labor liabilities, including salaries, local social security contributions, and benefits, which include sharing 10% of its profits with the outsourced employees.

## **Expanded Hiring Methods and Employment Relationships**

The new FLL adds two new hiring methods: Trial Periods and Initial Training Periods. Definite and indefinite term employment over 180 days may now include a Trial Period. This allows employers the ability to evaluate whether a new employee can perform the requisite job functions. Employers may also opt for an Initial Training Period, which allows the employer to train the employee on the skills necessary to perform the job. In both cases, the type of "new hire method" must be explicitly written into the employment agreement.

Both the Trial Period and the Initial Training Period have time limits. The Trial Period may only last up to 30 days for rank-and-file type employees, but for management-level employees and high-level executives, an extension may be granted allowing for a maximum of 180 days in total. The Initial Training Period has a maximum term of three months, with high-level general administrative functions or functions requiring special professional knowledge qualifying for an extension of up to six months in total. Please note that these terms cannot be combined. The advantage of these new hire methods is that once the trial or training period has expired, if the employee is not able to perform the skills for the job, the employer may terminate the employee without having to pay severance.

The FLL also adds to the existing contracts for an indefinite term or specific project. Specifically, in order to allow "seasonal" employees to gain seniority, employers may now offer employment for an indefinite term for un-continuous work when the services required are for fixed and periodic tasks, in the cases of seasonal activities, or that do not require the provision of services throughout the entire week, month, or year. Under this arrangement, the employment relationship can be suspended during off periods in order to relieve the employer of wage payment obligations and the employee of any service obligations.

## **Wages**

Back wages has been an issues of great concern to small and medium-sized businesses. Currently, the prolonged duration of labor trials is the cause of massive economic liabilities due to the accumulation of back wages. Therefore, new FLL limits the accumulation of back wages to 12 months. Once that period has concluded, a monthly interest rate of 2% will be generated on 15 months of the employee's monthly wage, which are to be paid once the process has concluded. Additionally, under the new law, the accrual of back wages will be suspended if the worker has died.

Furthermore, with the reform, employers are now allowed to utilize additional methods to pay wages. With the employee's prior consent, an employer will be able to pay wages by check, direct deposit, transfers, or through any other electronic means. This would provide workers with greater safety given the current circumstances.

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The reform also allows employers and employees the option of paying for work at an hourly, rather than a per diem rate, provided that the maximum daily working hours (eight per day) are not exceeded and the employees' daily income is not less than the minimum daily wage. This latter provision can be interpreted as being in harmony with the definition of minimum wage established by the Law, which would mean that the worker should receive at least the minimum wage, even when working fewer hours than the maximum established under the Law.

## **Nondiscrimination and Anti-Harassment in the Workplace**

The new law introduces the concept of a decent or respectable job, the definition of which includes the concepts of diversity, nondiscrimination, and anti-harassment. The FLL now prohibits discrimination on the basis of race, national origin, gender, age, disability, social status, health condition, religion, citizenship status, sexual preference, marital status, opinions, or any other category of discrimination that contradicts human dignity. The law also prohibits harassment, including sexual harassment and bullying and gives these provisions teeth by adding them to the list of justifiable causes for termination.

Just as in the US, all anti-discrimination and anti-harassment policies and training programs should include reporting mechanisms that will help the employer investigate and, if necessary, put an end to any illegal harassment.

## **Maternity Leave Changes**

Under the previous law, women had the right to a six weeks' leave prior to the birth of a child and six weeks following the birth of a child. Under certain circumstances, the new FLL allows women to allocate up to four of the six weeks of the pre-birth leave to the post-birth leave period (i.e., a woman may take maternity leave as few as two weeks before the birth of a child and up to ten weeks after the birth of a child). Additionally, if a child is born with disabilities or requires medical attention, the post-birth leave may be extended for up to two additional weeks. In the case of adoption, female employees are entitled to six weeks' leave following receipt of the child.

While an employee is breastfeeding, working hours may be reduced, for up to a maximum of six-months, by one hour in order to allow a mother to be with her newborn child. In case of a health emergency, pregnant or breastfeeding women shall not be required to work and shall receive full salary and benefit payments.

## **New Paternity Leave**

The FLL provides for a mandatory paternity leave up to five paid working days for the birth or adoption of a child.

## **Sanctions**

Under the FLL, the amount of the fines that employers may incur in the event of non-compliance with any provisions under the Federal Labor Law increase significantly. The fines may now be up to an amount equivalent to 5000 minimum salary days (approximately \$311,000 Mexican Pesos or US \$24,000 Dollars) in some cases, per occurrence.

## **Implications**

Mexico's labor law reforms are a positive step toward stimulating job creation and providing greater certainty regarding legal and economic exposure to companies doing business in Mexico. Although the practical implications of the law are yet to be determined, we recommend that U.S. employers with operations in Mexico revisit their employment practices to take advantage of, and ensure compliance with, these reforms.

Furthermore, given the new outsourcing provisions, companies will need to evaluate the structure of their current legal entities in Mexico. Employers that use outsourcing services to staff their operations in Mexico should review their existing practices and policies, as well as their services agreements to ensure they comply with the new legal framework.

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