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# Open for Business: Puerto Rico Enacts Sweeping Labor Reform

Article By:

Melissa C. Rodriguez

Employer-friendly revisions to attract new businesses and facilitate operations for existing enterprises signals a new era of labor flexibility in Puerto Rico.

On January 26, 2017, weeks after being sworn in as the 12th governor of Puerto Rico on January 2, Ricardo Rosselló signed into law the “Labor Transformation and Flexibility Act” (the Act), the island’s first significant labor reform legislation in decades. After being introduced by Rosselló’s administration on January 9, the Act quickly advanced through the legislature and became effective on the date it was signed.

The Act, which is comprised of various sweeping labor reform measures, aims to stimulate Puerto Rico’s struggling economy through employer-friendly revisions to attract new businesses and facilitate operations for existing enterprises. Its passage signals a new era of labor flexibility in Puerto Rico, which has historically represented for private-sector employers a complex and often rigid web of rules and a challenging environment for business. Speaking from the laundromat where he signed the Act, Rosselló announced, “We want to emphasize to the entire world that Puerto Rico is open for business.”

## Summary of Key Provisions

The Act makes significant changes to more than a dozen existing statutes, including those governing employment discrimination, wrongful termination, wages and hours, entitlement to vacation and sick leave, lactation breaks, and employee benefits. This article provides a summary of some the Act’s key provisions.

### FLEXICURITY: CHANGES TO LAW 80 (UNJUST DISMISSAL STATUTE)

***Among other changes, the Act caps Law 80 severance payment amounts, enlarges the probationary period, requires a mandatory settlement hearing, and reduces the statute of limitations for claims under Law 80***

- The Act revises the formula for Law 80 severance (“mesada”) for employees hired after the Act’s effective date who work for indefinite terms and who are discharged without “just

cause” to: (a) an amount equivalent to 3 months’ salary; and (b) an amount equivalent to two weeks’ salary for each year of service. For employees hired after the Act’s effective date, the severance is capped at nine months. Employees hired before the Act’s effective date are not subject to the cap. The Act further provides that certain discharge payments can be offset against a severance obligation.

- Prior to the Act, Law 80 imposed the burden of proof on employers to demonstrate that there was “just cause” for termination. The Act eliminates the language concerning the employer’s burden to prove that a termination was justified in order to avoid the payment of Law 80 severance.

- The definition of "just cause" is slightly modified to include “[t]hat the employee incurs a pattern of performance that is deficient, inefficient, unsatisfactory, poor, tardy, or negligent. This includes not complying with the employer’s norms and standards of quality and security, low productivity, lack of competence or ability to perform the work at reasonable levels required by the employer, and repeated complaints from the employer’s clients.”

- While the Act reiterates that Law 80 claims are not prospectively waivable, it includes provisions for a valid settlement or release of a potential Law 80 claim.

- Section 4.7 of the Act codifies the standards for determining whether there was a constructive discharge developed in case law. It states that acts directed to induce or compel an employee to resign constitute a discharge when the only reasonable alternative is to resign. Mere annoyance is not enough. Rather, the employer’s actions must be arbitrary, unreasonable, and capricious, generating a hostile environment that impedes the employee’s sound stay in the job, and must be originated by a motive foreign to the employer’s legitimate interests in safeguarding the good of the business. Where criticisms and humiliations are involved, they must be of a substantial magnitude. The mere allegation that an employee was forced to resign is insufficient. The employee must demonstrate concrete acts proving that the employer had the intention of injuring or prejudicing the employee’s condition.

- Executive, administrative, and professional employees hired after the Act have an automatic probationary period of 12 months, and all other employees have an automatic probationary period of nine months. If there is a union, the probationary period will be set by the employer and the union. Written probationary agreements are no longer required. This extended probationary period lengthens the time during which employers may discharge employees without “just cause” or the payment of Law 80 severance.

- In all Law 80 lawsuits, a mandatory settlement hearing will be held within 60 days after the employer files its answer to the complaint.

- The statute of limitations for Law 80 claims for terminations after the Act is reduced to one year from three years through the Act’s amendments.

## WORKPLACE AND FLEXIBLE BENEFITS: CHANGES TO WAGE & HOUR AND LEAVE REQUIREMENTS

***Updates to Law 379 and near complete repeal of the Closing Law include elimination of Sunday premium pay and changes to certain overtime requirements, meal breaks, and statute of limitations for wage-and-hour claims***

- Section 3.1 revises the definition of “overtime” such that daily overtime is now required for work over eight hours during any calendar day. This definition represents an amendment to Law 379, under which hours worked in excess of eight in any consecutive 24-hour period were considered overtime.

- This section also virtually repeals the Closing Law, including by eliminating the restrictions on certain retail operations on Sundays from 5 am to 11 am, including eliminating the requirement that employees be paid premium rates for working on Sunday. Retailers previously covered by the Closing Law continue to be precluded under the Act from opening on Good Friday and Easter Sunday.

- Section 3.3 amends Law 379, under which certain employees were entitled to overtime pay of two times their regular rate of pay. For employees hired after the Act came into force, overtime is compensated at a rate of one and a half times the regular rate (time and a half). Employees with a right to greater benefits before the Act went into effect preserve the greater benefit while they work for the same employer.

- An employer and employee may agree in writing to establish an alternate workweek in which an employee works 10 regular hours for four days each week, without incurring the employer’s obligation to pay daily overtime. However, if, under the alternate workweek, an employee works more than 10 hours in a day, the employee is owed overtime.

- Employees will be entitled to request flexibility regarding work hours and place of employment, and employers will have the obligation to respond and to provide alternatives if the request is declined.

- If an employee does not work more than six hours in a day, the employer is now not required to provide a meal break. However, where a meal break is provided, the meal period generally must start between the conclusion of the second (instead of third) consecutive work hour and the beginning of the sixth. Although employees working more than 10 hours a day may be entitled to a second meal break, this section of the Act amends Law 379 by stating that if employees do not work more than 12 hours a day, the second meal break may be obviated.

- There is now a one-year statute of limitations for wage-and-hour claims under the Act, instead of the three years previously afforded under Law 379. The period is calculated from the time the employee ceased his employment. Wage-and-hour claims made before the approval of the Act are subject to the previous statute of limitations.

***Changes to Law 148 result in increase to work hours eligibility requirement for and reduction of percentage of salary paid as Christmas Bonus***

- For employees hired after the Act's effective date, the requirement of hours worked between October 1 and September 30 of the next year is increased from 700 hours to 1,350 to be entitled to a Christmas Bonus.

- The Christmas Bonus is reduced to 2% of salary, from the previous 6% or 3% (depending on the size of the employer). For large businesses (employers with more than 20 employees), the maximum Christmas Bonus owed per employee is $600. For small businesses (20 employees or fewer), the maximum Christmas Bonus owed per employee is $300.

- Employees hired on the Act's effective date will receive only 50% of the regular Christmas Bonus during their first year of employment.

- The Christmas Bonus will now be paid between November 15 and December 15, instead of between December 1 and December 15.

- Employers may credit any other bonus previously paid to employees during the year against the Christmas Bonus, provided that the employees are given written notice of the employer's intention to do so.

***Amendments to Law 180 adjust rates of accrual of vacation and sick leave***

- Previously, under Law 180, employees accrued vacation at the rate of 1¼ days, and sick leave at the rate of one day, for each month in which the employee worked at least 115 hours. Under the Act, the minimum-hour requirement to accrue vacation and sick leave has been increased to 130 hours. Employees who worked for an employer before the Act went into effect and had rates of accrual of vacation and sick leave superior to that provided in the Act continue to have the same rates while they work for the same employer.

- For employees hired after the Act, the minimum monthly accrual of vacation leave will be half a day during the first year of service; three-quarters of a day after the first year until the fifth year; one a day after five years until 15 years; and 1¼ a day after 15 years. However, if an employer has no more than 12 employees, the minimum monthly accrual of vacation leave is a fixed half a day a month.

- The minimum monthly accrual of sick leave continues to be one day for each month of service, subject to the increase to the minimum hours worked requirement.

***Enhancement of rights of breastfeeding mothers through amendments to Law 427***

- Employers must provide nursing mothers the opportunity to breastfeed or express breast milk for one hour each day, which can be broken up into two 30-minute periods or three 20-minute periods. Spaces for breastfeeding or expressing breast milk must guarantee the nursing mother privacy, security, and hygiene, and should have electrical outlets and ventilation. If the employee works part-time and the workday exceeds four hours, the lactation break must be 30 minutes for each period of four consecutive hours of work. (Section 3.29 defines full-time as a workday of at least 7½ hours, and part-time as a workday of less than 7½ hours.)

- In small businesses, lactation breaks must be half an hour each workday, which can be broken up into two 15-minute periods. If the employee works part-time and the workday exceeds four hours, there must be a 30-minute lactation break for each period of four consecutive hours of work.

## EMPLOYMENT CONTRACT: TESTS AND PRESUMPTIONS FOR INDEPENDENT CONTRACTORS

***The Act defines employment contract and sets "common law test" and presumption for evaluating existence of independent contractor relationship***

- Section 2.1 defines an employment contract as "a contract by which a legal or natural person, called 'employer,' hires a natural person, called an 'employee,' to render services of a voluntary nature for the benefit of the employer or a third person, in return for receiving compensation for the services rendered, when the services are rendered by others and within the scope of the organization and under the direct direction of the employer." The Act specifically excludes from this definition independent contractors, franchisees, and government employees and public functionaries.

- Section 2.3 of the Act creates an irrebuttable presumption that a person is an independent contractor if he/she possesses or has requested an employer identification number or employer social security number; has filed income tax returns claiming to own a business; the independent contractor relationship is established by written contract; he/she is contractually required to have licenses or permits; and he/she meets certain tests evidencing that he/she has discretion over the engagement, including in the way the work is performed, its timing, the ability to do work for others, and the ability to hire/contract staff or other help.

- If the factors to establish the independent-contractor presumption are not met, the "common law test" is used to determine whether there is an employee or independent contractor relationship, including what the parties expressed in their contract and the degree of direct control exercised over the manner in which the work is performed. The Act specifically provides that, unless required by a federal law applicable to Puerto Rico, the "economic reality" test should not be used to evaluate whether an independent contractor relationship exists.

***Electronic signatures are recognized***

- Under Section 2.6, electronic signatures are recognized and given the same legal effect as written signatures.

***Puerto Rican employment laws must be interpreted consistently with US federal law***

- Section 2.13 provides that all Puerto Rican laws or regulations on the employment relationship, in matters similar to those regulated by a law or regulation of the United States, must be interpreted consistently with the law or regulation of the United States, unless Puerto Rico law expressly requires a different interpretation.

***Employee Bill of Rights Established***

- Under Section 2.14, the Act enumerates certain rights of employees including
    - the right not to be discriminated or retaliated against based on criteria prohibited by law;
    - protection from risks to health or physical integrity;
    - protection of privacy, subject to the employer's legitimate interests to protect its business, property, and workplace, or as provided by law;
    - respect of dignity;
    - punctual compensation;
    - the individual or collective pursuit of actions arising from the employment contract; and
    - all rights that arise from the employment contract.

- The Act also establishes, under Section 2.15, certain employee "duties," including "satisfying the responsibilities and obligations of the job in conformity with the employer's norms, good faith, and diligence" and complying with the employer's orders and instructions.

**New religious *accommodations* entitlements established**

- After an employee or prospective employee notifies the employer in writing of the need for a religious accommodation, the employer must reasonably accommodate the individual's religious practices. An employer may deny such accommodation only when it can demonstrate that the employee's chosen method would result in undue burden. The mere assumption that many other people with the same religious practices might also require reasonable accommodation is not evidence of undue burden. An employer may not penalize an employee for attending a religious service, or refuse to permit an employee to participate in a religious service. The Act imposes fines of $1,000 to $5,000 for violation of the religious accommodation provisions.

### RESERVATION OF EMPLOYMENT BY REASON OF INCAPACITY

***The Act reduces certain job reservation periods***

The right to reinstatement for a disability or incapacity that began before the Act went into effect will be governed by job reservation rules applicable from before the effective date of the Act. For new conditions arising on or after the Act's effective date, the Act decreases the job reservation provisions of the Puerto Rico System for Work-Related Accidents Act and Non-Occupational Disability Insurance Act ("SINOT," in Spanish) from one year to six months for employers with 15 or fewer employees. Employers with more than 15 employees continue to be subject to prior job reservation requirements.

### EMPLOYMENT DISCRIMINATION

***The Act eliminates certain presumptions and adopts federal compensatory and punitive damages caps for claims of discrimination***

The Act eliminates the presumption of discrimination in terminations without just cause, and adopts the standards of federal antidiscrimination laws.

It establishes a separate chapter on employment discrimination to adopt the caps to compensatory and punitive damages awarded to employees in discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964 (Title VII). As under Title VII, the damages caps under the Act range from $50,000 to $300,000, depending on the number of persons employed.

### APPLICABILITY

***New terms of employment under the Act generally only available for new hires***

Section 1.2 of the Act provides that employees hired before the Act's effective date will generally retain the same rights and benefits that they had before, to the extent they are more favorable than those provided in the Act, unless otherwise provided. In various sections, the Act makes clear that it will be illegal for employers to fire and replace existing employees in order to take advantage of the more favorable terms introduced through the Act.

## Implications for Employers

Employers in Puerto Rico should examine their employment and payroll policies and procedures, and evaluate the impact of implementing the Act's changes. They may want to modify these policies and procedures to take advantage of the Act's provisions that are designed to ease employers' burdens. Revising policies and procedures may be challenging, in part because of the Act's broad scope and the fact that the Act differentiates between employees hired before and after its effective date with respect to certain provisions. Careful attention must be paid to which employees the Act's provisions apply, and employment handbooks should be revised to reflect the Act's provisions.



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