

MEXICO

BASIC LABOR LAW CONCEPTS, NON-COMPETES, NON-DISCLOSURES AND EMPLOYEE INVENTIONS.

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I. Legal Framework of Mexican Labor Law.

Practicing in Minnesota, we have the luxury of knowing that employers and employees have the freedom to contract with relatively few restrictions imposed by law. Sometimes the employer is able to negotiate favorably; sometimes the employee ends up with a stronger position. Furthermore, since we are an employment-at-will jurisdiction, employers know that they can generally terminate employees without having a legal obligation to pay severance or damages. Many concepts taken for granted in the United States do not apply in Mexico. Before U.S. employers hire employees in Mexico, it is important to become familiar with Mexican labor law.

Mexico's labor law framework is much more protective of workers than are State and Federal laws in the United States. Mexico is a code country. Therefore, the codes or statutes applicable to labor matters regulate the labor relationship and dictate what many important employment terms will be, whether or not the employer and the employee enter into a written employment agreement. More importantly, even if the parties enter into an employment agreement, if the agreement is inconsistent with the protections and rights provided to the employee under the code, the code protections will in most cases prevail. Many companies with employees in Mexico assume that their standard form employment agreement is enforceable in Mexico. What U.S. employers with employees in Mexico need to know is that the various Mexican codes applicable to labor matters may make many key provisions of their standard form employment agreement unenforceable and may have the effect of giving the Mexican employee (or the U.S. employee working in Mexico) rights that the employer thought it had negotiated away.

Unlike in the United States, Mexican employee rights are constitutionally guaranteed. Mexican labor law has its foundation in Article 123 of the Mexican Constitution, and is implemented through a number of Federal laws, including, the Federal Labor Law (*Ley Federal del Trabajo*), the law regulating the National Housing Fund for Workers (*Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores*), the Social Security Law (*Ley del Seguro Social*) and others. The Federal Labor Law, first adopted in 1931, and amended in 1970, regulates private employment relationships, as well as organized labor relations. What follows is a summary of important concepts of Mexican labor law (by no means exhaustive), and a specific discussion of the enforceability of non-compete, confidentiality/non-disclosure and invention and intellectual property transfer agreements. This discussion focuses on the private employment relationship, rather than on provisions and laws regulating organized labor.

II. Some Mexican Labor Law Basics.

- A. What Constitutes an Employment Relationship and How Does it Arise?** The Mexican Federal Labor Law dictates when an employment relationship exists, and defines the terms of the employment relationship.
 - 1. Definition of Employment Relationship.** Article 20 of the Mexican Federal Labor Law states that an employment relationship exists, irrespective of the act from which it originated (i.e. whether evidenced by a written agreement or an oral agreement), wherever a person renders

personal services to another person or entity, subject to the authority and direction of the other person or entity, in exchange for remuneration.

2. **Definition of an Individual Employment Contract.** Article 20 further defines an individual employment contract as a contract by which a person binds herself to provide services to another person or entity, subject to the authority and direction of the other person or entity, in exchange for remuneration. Article 21 of the Federal Labor Law states that the existence of a contract for employment and an employment relationship shall be presumed if the relationship described in Article 20 is found to exist.
3. **Written Employment Agreement.** In application, Articles 20 and 21 mean that an employment relationship exists, regardless of whether the relationship is defined in writing. While an agreement will be presumed in the absence of a writing, and while in practice many employers fail to evidence the terms of the employment relationship in writing, Article 24 of the Federal Labor Code requires that the terms of employment be in writing, that 2 copies of the written agreement be made, and that one copy be given to the employee. Article 24 can be complied with by providing the employee with a letter confirming the terms of employment, but most labor law practitioners in Mexico agree that, because Mexican law requires employers to prove what the terms of an employees employment are, it is preferable to provide employees with a formal written employment agreement specifically describing those terms.
4. **Contents of Written Employment Agreement.** The written employment agreement must, according to Article 25 of the Federal Labor Law, contain, at a minimum:
 - a) name, age, nationality, sex, marital status and address of the worker and the employer;
 - b) whether the labor relationship is for a specific project or task, for a specific term or for an indeterminate term;
 - c) the service or services to be provided, to be described with as much precision as possible;
 - d) the place or places where the services are to be performed;
 - e) the daily hours worked;
 - f) the form and amount of wages;
 - g) the day and place of payment of wages;
 - h) an indication of the occupational training to be given to the worker;
 - i) other employment conditions, such as rest days, vacation, leave and other terms agreed to by the worker and the employer.

It is important for employers to put terms of employment in writing, not only because Article 24 requires employers to do so, but also because Article 26 of the Federal Labor Law makes clear that the absence of a written agreement will not deprive the employee of her rights. Article 26 further states that the employer will be held at fault for failure to comply with the writing requirement. Additionally, Article 27 provides that if the services to be performed are not set out in writing, the employee shall be deemed to be bound to perform only services compatible with her skills of the same kind carried on in the business. Finally, it is important to have terms of employment in writing because under Mexican law, an employee is legally entitled to all compensation, including benefits, that she can demonstrate she has received from the employer, regardless of whether the term is in writing, provided the compensation and benefits have been provided for at least two years. In a labor dispute, the employee may claim entitlement to compensation not agreed to by the employer. If the employer cannot prove the compensation was not agreed to and was not provided to the employee, the Conciliation and Labor Board hearing the dispute could award the compensation to be paid.

- B. Duration of Employment.** Article 35 of The Federal Labor Law provides that the duration of employment relationships shall be either for the length of time required to complete a specified project, a specific (i.e. limited) duration, or of indeterminate duration. In the event that the employment agreement is silent regarding duration, the law presumes the agreement to be of indeterminate duration. Most importantly, the term of employment may only be limited to a specific project or term if the circumstances support the need for such a limited term. Otherwise, regardless of what the written agreement states, the term of employment will be deemed indeterminate.
- C. Termination of Employment With Cause.** An employer may terminate an employee's employment without liability only upon completion of the project, upon expiration of the specified term of employment, or for cause as defined in Article 47 of the Federal Labor Law. Article 47 lists 15 causes for termination:
- a) the employee provides false references regarding her abilities, skills and qualifications for the job;
 - b) the employee is found guilty in the course of her employment of a dishonest or dishonorable action, violence, threats or ill-treatment towards the employer or any member of the employer's family or top management or managerial personnel of the work place, except in cases of provocation or self defense.
 - c) the employee is guilty of any acts mentioned in the proceeding items towards any co-workers;

- d) the employee is guilty, outside of the work place, of any acts mentioned in item b) above towards the employer, any member of the employer's family or the top management or managerial personnel, in the said acts are of such a serious nature as to render the fulfillment of the labor contract impossible;
- e) the employee intentionally causes material damage to the buildings, machinery, tools, raw materials or other items in work place;
- f) the employee causes damage of a serious nature, acting without malicious intent, but with negligence which is the sole cause of the damage;
- g) the employee negligently or carelessly endangers the safety of the work place or persons therein
- h) the employee is guilty of immoral conduct in the work place;
- i) the employee reveals trade secrets or communicates matters of a private or proprietary nature to the detriment of the business;
- j) the employee is absent for more than three times in a period of thirty days without the employer's permission or without sufficient excuse;
- k) the employee refuses to obey the employer or her representatives without sufficient reason in matters connected with the services the employee has agreed to provide;
- l) the employee refuses to adopt preventive measures to follow the procedures put in force for prevention of accidents or disease;
- m) the employee attends work intoxicated or under the influence of a narcotic or harmful drug, unless she has a medical prescription, in which case, she must inform the employer of her prescription and submit a certificate signed by a doctor;
- n) an executory judgment sentencing the employee to a term of imprisonment preventing her from fulfilling her obligations under the labor relationship is issued;
- o) other grounds similar to those specified in the preceding paragraphs, if such grounds are of equal gravity and entail similar consequences.

In the event of termination for cause, the employer must give written notice to the employee of the date of the termination of her contract and

the reasons for termination. Failure to provide written notice of the reasons for termination shall be sufficient grounds to consider that the termination was not justified.

Mexico has a Conciliation and Arbitration Board, which is an administrative agency charged with resolving labor disputes. An employee may file a complaint with the Conciliation and Arbitration Board demanding reinstatement or damages within two months of her discharge. The employer has the burden of proving that the employee was terminated for cause pursuant to Article 47 of the Federal labor law. If the employer fails to meet its burden of proof, the Conciliation and Arbitration Board may determine the termination was without justification and award appropriate relief as discussed below.

D. Termination of Employment Without Cause. In the event that the Conciliation and Arbitration Board determines that the employer terminated the employee without justification, the employee has the right pursuant to Article 48 of the Federal Labor Code to:

- a) Reinstatement of her job; or
- b) Compensation in the form of three months' wages based upon integrated compensation (i.e., as discussed above, all compensation, including benefits, that the employee can prove she received from the employer during the previous 2 years).

Article 49 of the Federal Labor Law provides that employers are not obligated to reinstate an employee, and the employee may not seek reinstatement, in cases in which: i) the employee has not been employed with the business for at least one year; ii) the employee is an executive employee; iii) the reinstatement, given all of the circumstances, would be impossible; iv) if the employee rendered domestic services; or v) if the employee worked part time.

Article 49 requires that if the employee requests reinstatement and is entitled to reinstatement, but the employer refuses to reinstate, then, in addition to the three months' compensation described in (b) above, the employer must also pay the indemnifications spelled out in Article 50 of the Federal Labor Law as follows:

- a) An amount equal to the total integrated compensation payable for one-half of the entire employment period if the employment was for less than one year, or an amount equal to six months' integrated compensation for the first year of service, plus twenty days' wages for each additional year of service;

- b) If the term of employment was indeterminate, then the compensation shall be twenty days' wages for each year of service;

Furthermore, in any event, the employer shall also pay the entire amount of integrated compensation due to the employee from the date of dismissal to the date on which the compensation is paid.

Finally, Article 162 of the Federal Labor Law mandates that the employer still has to pay a worker dismissed with or without cause, as well as an employee who resigns with fifteen years or more seniority, a seniority premium equal to twelve days' salary for each year of service rendered. The seniority premium may not, however, be greater than two times the minimum salary then in effect in the economic zone where the employer is located.

E. Conditions and Benefits of Employment. Many general terms of employment and benefits are found in and mandated by Title III of the Federal Labor Code, as well as other statutes mentioned above. Some terms include:

- a) Hours/Overtime. Work performed between 6:00 A.M. and 8:00 P.M. is considered day work. Work performed between 8:00 P.M. and 6:00 A.M. is night work. The typical work week is around 40 hours, with the maximum number of hours limited to six-eight hour days for the day shift and seven hours for the night shift. For each six day work period, employers must provide a day of rest with full pay. Article 63 of the Federal Labor Law provides that the day of rest fall on Sunday. If the employee works on Sunday, the law requires the employer pay the employee twenty five percent more than the employee's normal wage. Overtime is paid at twice the hourly wage for the first 9 hours after 48 or for working on a legal holiday, Saturday or Sunday, and triple-time beyond 9 hours.

- b) Vacation. Employees employed for more than one year are entitled to at least 6 days paid vacation. Vacation leave is increased 2 days for each additional year up to a maximum of 12 days. Additionally, for every 5 years of service, 2 additional days must be added. A quick guide for calculating vacation is as follows:

Year 1	6 days
Year 2	8 days
Year 3	10 days
Year 4	12 days
Year 5	14 days
Year 10	16 days
Year 15	18 days

- c) Legal Holidays. Mexico has 7 paid legal holidays including: January 1 (New Year's Day), February 5 (Constitution Day), March 21 (Benito Juarez Day), May 1 (Labor Day), September 16 (Independence Day), November 20 (Revolution Day), December 25 (Christmas). In addition to those already mentioned, every 6th year when a new president is sworn into office, employees receive a paid day off on December 1 (Inauguration Day).
- d) Minimum Wage. The minimum wage in Mexico is determined by the National Minimum Wage Commission. Mexico is divided into three economic zones for purposes of minimum wage rates. The highest wage is in Mexico City. Minimum wages are published from time to time in Mexico's Official Gazette, which is analogous to the Federal Register in the United States.
- e) Christmas Bonus (Aguinaldo). Employers must pay employees who have been in their service for at least one year, a year end bonus equal to at least 15 days' wages before December 20th of each year. By practice, the aguinaldo may be equal to 20 or 30 days wages. Employees who have worked for less than one year are entitled to a pro-rated aguinaldo equal to the portion of the year during which they have worked.
- f) Vacation Premium. Employers must pay a vacation premium to employees equal to 25% of the wages payable during the vacation period.
- g) Profit Sharing. After the first year of business (there is an exemption for the first year of business), employers must pay employees an amount equal to 10 percent of the profits of the employer. This amount is to be paid annually. Certain executive and confidential/trust employees are not entitled to the profit sharing. It is common practice in Mexico to limit the amount that a business pays out in profit sharing by hiring employees through a wholly-owned subsidiary that then contracts with the parent for employment services. While this is an obvious end-around the intent of the law, it is completely legal. The effect is that the parent pays the subsidiary cost plus 5% and thus reduces the amount it might otherwise have to pay if profit-sharing were based upon the profits of the parent.
- h) Social Security (IMSS). Employees must be registered with the Mexican Institute of Social Security (IMSS) within five days of their hire date. Employees and their dependents are entitled to IMSS benefits, including the following:

- Retirement Benefits. Retirement is at age 60, with at least 1,250 weekly contributions. The benefit is calculated based upon a multiple of the minimum wage.
 - Survivor Benefits. Employees must purchase a life annuity with survivor benefits from a private insurance carrier using funds in their pension accounts.
 - Disability Pension. Employees must purchase an annuity with survivor's benefits from funds in their pension accounts.
 - Medical Coverage. Mexican employees may use IMSS medical facilities for essentially all of their health care needs. The benefits provide coverage for a period of 52 weeks, which may be extended if the employee is still contributing to the plan.
 - Sickness Compensation. Employees are entitled to 100% of their earnings for up to 72 weeks. After 72 weeks, disability benefits take effect.
 - Maternity. Pregnant employees are entitled to 100% of their weekly wages for up to 6 weeks before and 6 weeks after delivery.
 - Funeral Grants. Eligible employees are entitled to a payment equal to up to 2 months of minimum wage.
 - Day Care. Eligible employees are entitled to have their children ages 43 days to 4 years cared in day care facilities free of charge to the employee.
- i) Retirement Fund (SAR). Employers must contribute 2% of up to 25 times the annual minimum wage into the retirement fund. Employees may, but are not required to, contribute to the fund. The benefit is payable upon the employee's death, disability, or reaching retirement age. The benefits are paid out for a maximum of 20 years.
 - j) Workers' Housing Fund (INFONAVIT). Employers must contribute 5% of the employee's earnings to the Workers' Housing Fund. The funds are then placed into individual employee accounts to be used as a source of money for the employee to purchase a house, or as a source for low interest loans for the same purpose. If not used, the funds are paid to the employee upon retirement, death or disability.

III. Non-competition, Non-disclosure and Employee Intellectual Property Rights. While practitioners in Minnesota, and most other States in the United States, are accustomed to protecting business clients by including detailed and usually heavily employer-oriented non-compete, confidentiality and intellectual property provisions in employment agreements, such clauses may not be enforceable in Mexico. The enforceability of

employee non-competition, non-disclosure and intellectual property agreements is governed by the Federal Labor Law and the Mexican Industrial or Intellectual Property Law.

A. Enforceability of Non-Competition Agreements.

This first issue is relatively easy. Employee non-compete agreements are not enforceable under Mexican law. The Mexican Constitution and the Federal Labor Law specifically direct that such agreements or restrictions are void.

Article 5 of the Mexican Constitution states in part that:

No person shall be impeded from practicing a lawful profession, industry, commerce, or labor. The exercise of this liberty may only be stopped by judicial determination, when the rights of a third party are violated, or by government resolution, dictated in terms indicated by the law, when the norms of society are undermined. Nobody can be deprived of the fruits of his or her labor, except by judicial resolution...

The State may not permit the performance of any contract, covenant, or agreement which has as its object the restriction, loss, or irrevocable sacrifice of personal freedom for any reason, whether because of work, education or religious vows...

Neither can agreements be recognized in which persons agree to their banishment or exile, or in which they renounce, temporarily or permanently, the exercise of a given profession, trade, or commerce. A labor contract shall only contain the obligation to give services agreed to for the time fixed by law, not to exceed one year at the option of the worker, and it cannot include, in any case, the surrender, loss, or reduction of any political or civil rights.

Breach of this contract, with regard to the worker, shall only obligate him or her to receive the appropriate civil liability. In no case may personal compulsion be enacted against him or her.

In addition to the protections contained in the Mexican Constitution, the Federal Labor Law also discusses the invalidity of employee competition restrictions.

Article 4 of the Federal Labor Law provides that:

It is unlawful for any person to prevent another from working or engaging in any occupation, industry or trade she wishes, provided that such occupation is lawful. The exercise of these rights may be prohibited only by decision of the competent authorities, and only when the rights of third parties or of the community are violated.

It is quite clear then that employers may not enforce non-competition covenants or agreements under any circumstances. While they are not enforceable, I generally do include non-compete language in the Mexican employment agreements I draft, because many employers want employees to think about the employer's competition concerns. If the employee violates the provision, however, attempting to enforce the provision is pointless. Given that the employer cannot enforce a non-compete agreement, it is important to note that the employer can at least rely upon laws that prohibit an employee from leaving with vital trade secrets and confidential information of the employer.

B. Enforcement of Confidentiality Agreements.

Article 47, Section IX of the Federal Labor Law specifically provides that an employer may terminate an employee for cause, and thus without liability, if the employee discloses trade secrets or confidential information to the detriment of the employer.

Additionally, trade secrets are protected by Mexico's Intellectual Property Law, adopted in 1991. The law defines "trade secrets" as information used in trade or commerce that is kept confidential by an individual or business to obtain or maintain a competitive advantage over third parties in the performance of the business' activities. In order to be protected, the employer must adopt methods to preserve, protect and restrict access to the trade secrets. Furthermore, the trade secrets must relate to the nature, characteristics, or purposes of the products of the employer, the methods or processes of production, the means or form of distribution, or to the marketing of products or rendering of the services of the person who must maintain the trade secrets confidential.

Information which is obvious or in the public domain is not protected by the Intellectual Property Law. Information in the form of documents, electronic or magnetic media, optical disks, microfilm, film or other similar media in tangible form are protectable. Additionally, confidential information disclosed verbally, may be protected once it is put in tangible form (i.e., written or recorded form), signed by the individuals involved, and marked with an indication that it is to be maintained confidential.

Because of the Federal Labor Law and the Intellectual Property Law control the protection of trade secrets and proprietary information, it is not required that employers have employees sign confidentiality agreements. It is always prudent, however, to reinforce the concepts described in the Federal Labor Law and the Intellectual Property Law by putting the concepts in a written agreement and having the employee acknowledge her obligations to maintain confidential information by signing the agreement. The written agreement will be enforced as long as it is consistent with the provisions of the Federal Labor Law and the Intellectual Property Law.

In the event that an employee violates her obligations pursuant to Article 47 of the Federal Labor Law, she is not only subject to termination without indemnification by the employer, and subject to having to pay compensatory damages and loss of anticipated profits under Article 86 of the Intellectual Property Law, but she may also be subject to criminal liability pursuant to Article 223, Section III of the Intellectual Property Law. Article 223 makes a party's knowing disclosure of confidential information a criminal offense:

To disclose to a third party a trade secret learned as a result of the work, position, duties or performance of the employee's job, business relationship, or as a result of the issuing of a license for its use, without the consent of the party maintaining the confidentiality of the trade secret, after having been made aware of its confidential nature, for the purpose of obtaining an economic benefit, or for the purpose of causing injury to the person maintaining the confidentiality of the trade secret.

The trade secret protections contained in the Federal Labor Law and the Intellectual Property Law are enforced through the Mexican Criminal Code.

C. Protection of Intellectual Property.

The ability of an employer to protect inventions created by an employee during the course of the employee's performing her duties is supported in Article 163 of the Federal Labor Law. Article 163 provides:

1. When the employee is assigned to provide services for research or improvement of the processes used in the business, the ownership of the invention and the rights to exploit the patent belongs to the employer. However, the employee/inventor shall have the right to additional compensation which will be determined by agreement between the parties, or by the Conciliation and Arbitration Board when the invention and the benefits accruing to the employer are not in proportion to the salary received by the employee/inventor; or
2. In any other case, the ownership of the invention belongs to the person who developed the invention, but the employer shall have a right of first refusal to the exclusive use or acquisition of the invention and any patents resulting therefrom.
3. In any event, the inventor shall have the right to have her name appear as the inventor/author of the invention.

The protections afforded by Article 163 of the Federal Labor Law are adopted by the Intellectual Property Law at Article 14 of the Intellectual Property Law. Article 15 of the Intellectual Property Law defines inventions to include what U.S. law considers copyrightable works. Thus, the Federal Labor Law clearly

recognizes the right of employers to protect inventions and other kinds of intellectual property created by their employees within the scope of employment. Again, it is advisable to include in the employment agreements of employers who are engaged in activities which are likely to result in protectable intellectual property, a clause which is consistent with Article 163 of the Federal Labor Law.

D. Word of Caution Regarding Contracts with Expatriate Employees Working in Mexico.

It is important to remember that when a U.S. employer sends employees to Mexico, even if the employee is subject to an employment agreement in the United States, the employee is also able to avail herself of the protections available under the Mexican law. It is best under such circumstances to draft the provisions of the employee's employment agreement in such a way that the agreement complies with both U.S. and Mexican law. For example, whereas under U.S. law an employer is not required by statute to provide an employee who creates a patentable invention with additional compensation, the employer sending a U.S. employee to Mexico may want to provide for such compensation in the employee's agreement. While this warning applies particularly to the Federal Labor Law provisions relating to non-competition, confidentiality and protection of inventions, keep in mind that it also applies to all benefits and indemnities that are available under Mexican law. A U.S. employee transferred to Mexico may essentially pick and choose between the protections available under Mexican law and under U.S. law and take advantage of the best of both.

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