

Puerto Rico Labor & Employment Alert

# GOVERNOR SIGNS THE LABOR TRANSFORMATION AND FLEXIBILITY ACT

January 26, 2017

What follows is a summary of the most salient changes to current labor legislation:

The Labor Transformation and Flexibility Act (“the Act”) provides that employees hired before the date of effectiveness will keep their current rights, as expressly provided in the articles of the Act. This appears to mean that amendments to actual labor laws apply both to current and new employees unless a specific article of the Act provides that the change applies only to employees hired after the enactment of the Act.

- 1) Unjust Dismissal Act (Law 80):
  - a) The statute of limitations is reduced from 3 to 1 year for claims filed after the Act is in effect.
  - b)
    - i. The formula of the indemnity for unjust dismissals after the expiration of the probationary period for those employed after the effectiveness of the Act, is increased to 3 months, plus 2 weeks’ pay per year of service; but with a cap equivalent to 9 months of salary. Current employees will continue to be covered by the actual indemnity formula, with no cap.
    - ii. "Salary" (upon which the indemnity is computed) is now clearly limited to basic salary and commissions, and all other compensation (including bonuses, stock grants, stock options, deferred compensation...) are expressly excluded from the computation of the formula.\*
  - c) The automatic probationary employment period for employees hired after the enactment of the Act is increased to 1 year for executives, administrators and professionals and to nine months for all other employees. This period can be reduced by mutual consent.
  - d) The misconduct that constitutes just cause for disciplinary dismissals is expanded and more clearly defined.
  - e) For layoffs, a new instance of just cause is added: “to make the company more competitive”. Also, the exception to the rule that inverse seniority in the affected classification must be applied in the selection of the employees to be laid off, in order for the dismissal to be considered with just cause, is liberalized. Now the less senior employee may be retained over the more senior if it is reasonably clear

he/she is better qualified or more efficient or has a better performance or disciplinary record. Also, in multi plant, store or branch operations only the seniority in the affected classifications in the affected unit need be considered unless substantial employee interchange exists between 2 or more units in the affected classifications and said units and classifications have common supervision of day to day operations.

- f) All years of service prior to an interruption in employment of more than 2 years will not be counted for seniority or the indemnity formula.
- g) The transfer of a going concern is limited to the purchase of all or part of a business and, among other things, where during the first 6 months after the sale more than 50% of the total employees of the purchaser are former employees of the seller.
- h) Any severance indemnity, regardless of whether it is mandatory or voluntary, is exempt from income taxation but up to an amount equal to the Act 80 formula.
- i) Constructive discharge will require intentional acts of the employer so severe that they leave no other alternative to the employee but to resign.
- j) Act 80 severance indemnity can be settled for a lesser amount once the decision of the discharge is communicated.
- k) Temporary employment that does not exceed 3 years (or such term provided in a temporary employment contract of an executive, administrator or professional) is presumed to be valid and, thus, not subject to Act 80.

- l) The dismissed employee now has the burden of proving that the dismissal was without cause

## 2) Christmas Bonus

- a) Employees hired before the enactment of the Act keep the current benefit and requirement of work hours.
- b) For employees hired after the enactment of the Act the required hours of work to qualify are increased to 1,350. The bonus will be 2% of salary earned up to a bonus of \$600 if the employer has more than 20 employees; and \$300 if the employer has 20 employees or less. During the first 2 years of employment the Bonus will be 50% of said amounts.
- c) The Bonus may be paid between November 15 and December 15.
- d) The income statement to apply for the exemption from payment of the bonus may be for the accounting year of the employer.
- e) Other bonuses paid during the year may be credited to reduce the Christmas bonus if prior written notice was given to the employee.\*

## 3) Overtime, Meal Period and Closing Law

- a) All overtime (and work rendered during meal periods) is payable at time and a half the regular rate of pay, except that the employees hired before the Act that were entitled to double time, continue with that benefit.
- b) The definition of the term "day" for purposes of the calculation of daily overtime has now changed from any 24 hour period, to a calendar day. This will eliminate "technical" overtime caused by changes in the time that the employee begins a workday or takes the meal period. The employer can designate an alternate 24 hour cycle, as long as five days prior written notice is

given to the employee and there are at least eight hours between consecutive work days. It is not clear whether the eight hours hiatus applies also to the calendar day alternative.

- c) Work performed during Sundays is not overtime unless it is in excess of 8 hours in the day, 40 hours in the workweek or during a seventh consecutive day of work. No special compensation has to be paid for work on Sundays after 11:00 am.
- d) A voluntary agreement with the employee is allowed whereby he/she may work up to 40 hours in a workweek in less than 5 days as long as the employee does not work more than 10 hours in a day. Work in excess of 10 hours must be paid at time and a half. After a year the agreement can be revoked by the employer or the employee. Severe criminal and civil penalties are provided against an employer who retaliates against an employee who refuses such an agreement.
- e) An employer may allow an employee to make up for absences in the workweek as long as not more than 12 hours are worked in a day and no more than 40 are worked in that week without having to pay overtime.
- f) The meal period must begin not before the end of the second hour of work and not after the beginning of the sixth hour of work. If the workday is of 6 or less hours of work, the meal period can be waived.
- g) The categories of exempt employees are increased and more clearly defined, and made more in line with the exemptions in the FLSA.
- h) Tips are not included to determine the regular rate of pay unless necessary to reach the statutory minimum salary.

- i) Employers are compelled to consider, and respond to within 20 days, employee requests for changes in work schedule, number of hours or place of employment. Only employees that work at least 30 hours in a week and have at least 1 year of employment are entitled to this. Priority must be given to requests from head of family with custody or paternal authority of minors. Retaliation for making the request is prohibited and penalized.
- j) The Closing Law is revoked, except that stores that now are required to close during Good Friday and Easter Sunday must continue to do so.

#### 4) Vacation and Sick Leaves

- a) Employees hired before the approval of the Act keep the current rates of accrual for vacation and sick leaves.
- b) Employees hired after the enactment of the Act accrue vacation leave at:  $\frac{1}{2}$  day per month during the first year of employment;  $\frac{3}{4}$  days between years 2 and 5; 1 day after 5 and up to 15 years of employment; and  $1\frac{1}{4}$  day after 15 days of employment. If the employer has up to 12 employees the accrual is  $\frac{3}{4}$  days per month. Discharging employees to replace them to benefit from this amendment is illegal.
- c) Sick leave continues to accrue at 1 day per month.
- d) All employees must work at least 130 hours in a month to accrue vacation or sick leave.\*
- e) The statute of limitations to present a salary claim is reduced from 3 to 1 year, except for claims made prior to the enactment of the Act.

#### 5) Independent Contractors

- a) An indisputable legal presumption is established that a person is an

independent contractor if he/she meets several specified requirements.

- b) If the person does not meet all such requirements the status of independent contractor shall be determined by the traditional "common law" test, which depends, mainly, on the degree of independence that the contractor has in the manner in which it provides the service vis a vis the degree of control that the principal exerts.
- c) Courts are prohibited from using the test of "economic dependence", with which it is easier to prove that the person is really an employee.

#### 6) Participation in Religious Services

Employers will be required to make reasonable accommodations in the work schedule of an employee in order to participate in a religious activity. If it is a recurrent activity, a single request will suffice. The method to accommodate preferred by the employee must be granted unless the employer demonstrates it will result in undue hardship. Failure to make the accommodation, or taking reprisals for the request, will result in an administrative fee not lower than \$1,000 nor higher than \$5,000.

#### 7) Discrimination in Employment

- a) Damages for mental anguish, compensatory or punitive damages are limited to: \$50,000 if the employer has less than 101 employees; \$100,000 if 101 or up to 200; \$200,000 if 201 or up to 500; and \$300,000 if more than 500.
- b) The presumption that the employer incurred in discrimination if the alleged

discharge or other adverse employment action was without just cause, is eliminated.

- c) The employer is not presumed to have known of the situation of an employee who alleges discrimination because he/she is a victim of domestic violence, sexual aggression or stalking.
- d) Protection to breastfeeding mothers and requirements of adequate spaces in the work place to express breast milk, are improved and extended to part timers.

#### 8) Employment Contracts

- a) Extensive provisions on the rights and duties of an employee subject to an employment contract are provided, including that applicable local laws and regulations must be interpreted consistent with similar federal laws and regulations.
- b) Employees temporarily assigned to work in Puerto Rico for not more than 3 years by an employer operating in another jurisdiction, will be subject to the provisions of the contract except that local tax, employment discrimination and workmen's compensation laws will be applicable.
- c) The statute of limitations for claims for violation of a contract of employment is reduced from 15 to 1 year except for causes of actions which arose before the effectiveness of the Act.

#### 9) Unemployment Benefits

Employees hired after the Act will be entitled to higher unemployment benefits, and unemployment insurance rates will be increased accordingly.

The above is a short and, by necessity, incomplete, summary of this lengthy and complex law.

**Contact us**

Please feel free to call us to clarify any doubts on the implementation of the Act to your operations.

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\* It appears that this applies not only to future employees, but also to current employees.