

Labour & Employment

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek



2016

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Labour & Employment 2016

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek
Morgan, Lewis & Bockius LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2006
Eleventh edition
ISSN 1750-9920

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of April 2016, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	7	Germany	101
Mark E Zelek Morgan, Lewis & Bockius LLP		Walter Ahrens Morgan, Lewis & Bockius LLP	
Using non-competes and other restrictive covenants globally	9	India	109
Matthew Howse Morgan, Lewis & Bockius LLP		Rohit Kochhar Kochhar & Company	
Afghanistan	11	Indonesia	115
Ghazi Khan and Muhammad Ismail Legal Oracles		Johannes C Sahetapy-Engel and Anissa Paramita Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)	
Australia	16	Italy	120
Joydeep Hor and Therese MacDermott People + Culture Strategies		Valeria Morosini Toffoletto De Luca Tamajo e Soci - <i>member of Ius Laboris</i>	
Austria	22	Japan	128
Thomas Boller BLS Rechtsanwälte Boller Langhammer Schubert GmbH		Motoi Fujii and Tomoko Narita TMI Associates	
Belgium	29	Kazakhstan	138
Emmanuel Plasschaert, Evelien Jamaels and Alex Franchimont Crowell & Moring		Klara Nurgaziyeva and Marat Mukhamediyev Morgan, Lewis & Bockius LLP	
Brazil	34	Korea	144
Fabio Medeiros Machado Associados Advogados e Consultores		Sun Ha Kweon, Milosz Zurkowski and Sung Il Yoon Kim & Chang	
Bulgaria	41	Luxembourg	150
Maria Drenska and Maya Aleksandrova Pavlov and Partners Law Firm in cooperation with CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH		Guy Castegnaro and Ariane Claverie Castegnaro - <i>member of Ius Laboris</i>	
Canada	47	Malaysia	160
Craig T Munroe, Roy L Heenan and Andrea L Zwack Gall Legge Grant & Munroe LLP		Selvamalar Alagaratnam Skrine	
Chile	56	Mexico	166
Jaime Salinas Toledo and María Francisca Montenegro Philippi, Prietocarrizosa & Uria		Humberto Padilla Gonzalez Morgan, Lewis & Bockius LLP	
China	63	Norway	171
Min Duan Morgan, Lewis & Bockius LLP		Tore Lerheim and Ole Kristian Olsby Hombler Olsby advokatfirma AS	
Cyprus	70	Peru	177
George Mountis and Yiannis Karamanolis Dr K Chrysostomides & Co LLC		Alberto Varillas and Sara Kalinicos García Sayán Abogados	
Denmark	76	Portugal	182
Morten Langer Norrbonm Vinding		Ricardo Grilo Barrocas & Associados - Sociedade de Advogados, RL	
Ecuador	82	Puerto Rico	189
Patricia Ponce Bustamante & Bustamante Law Firm		Melissa C Rodriguez Morgan, Lewis & Bockius LLP	
Finland	87	Russia	196
Seppo Havia Dittmar & Indrenius		Bela Pelman and Dmitry Dmitriev Morgan, Lewis & Bockius LLP	
France	94	Singapore	203
Sabine Smith-Vidal and Charles Dauthier Morgan, Lewis & Bockius LLP		Ian Lim, Nicole Wee and Jamie Chin TSMP Law Corporation	

Slovakia	212	Turkey	244
Pavol Rak and Lucia Trnková Noerr s.r.o.		Nilgün Serdar Şimşek, Çağıl Şahin Sünbül and İpek Okucu GSG Attorneys at Law	
Slovenia	218	United Arab Emirates	251
Darja Miklavčič Odvetniki Šelih & partnerji, o.p., d.o.o.		Charles Laubach Afridi & Angell	
Spain	224	United Kingdom	257
Iñigo Sagardoy and Ricardo García Fernández Sagardoy Abogados – <i>member of Ius Laboris</i>		Matthew Howse, Lee Harding and Nicholas Hobson Morgan, Lewis & Bockius LLP	
Sweden	231	United States	264
Robert Stromberg and Jonas Lindskog Cederquist		David A McManus and Michelle Seldin Silverman Morgan, Lewis & Bockius LLP	
Switzerland	238	Venezuela	272
Roberta Papa and Thomas Pietruszak Blesi & Papa		John D Tucker, Pablo Benavente and María Elena Subero Hoet Peláez Castillo & Duque	

Ecuador

Patricia Ponce

Bustamante & Bustamante Law Firm

Legislation and agencies

1 What are the main statutes and regulations relating to employment?

The main regulations are:

- the political Constitution of Ecuador;
- international conventions, among others, those of the International Labour Organization, duly ratified by Ecuador;
- the Labour Code; and
- the Social Security Act.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

Yes. Different laws, including the Political Constitution, ILO Conventions, Labour Code and specific laws for the disabled, prohibit the harassment of, and discrimination against, women or the disabled, as well as harassment or discrimination because of race, gender, political and sexual preferences, catastrophic or specific diseases, such as HIV, and so on.

3 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The Labour Ministry and the Ecuadorian Social Security Institute (IESS).

Worker representation

4 Is there any legislation mandating or allowing the establishment of a works council or workers' committee in the workplace?

National Labour and Salary Council: A three-party consultant body for implementing dialogue and labour and employment policies covering salaries. It is integrated by the Labour Vice-Minister, two employer representatives and two workers' representatives.

Inter-Institutional Committee of Occupational Safety and Health: The Inter-Institutional Committee of Occupational Safety and Health is in charge of coordinating the executive actions of all public-sector entities that have to be taken by employers and workers for preventing occupational hazards and occupational diseases and also for improving the work environment. The Committee is integrated by:

- the chief of the Occupational Safety and Health Department, representing the Ministry of Labour;
- a delegate from the National Environmental Control Office representing the Health Ministry;
- the chief of the IESS Risks Division, in representation thereof;
- three delegates from the employer sector; and
- three delegates from the labour sector.

Companies and offices with at least 10 employees must have an occupational health and safety regulation not only for preventing accidents at work and protecting the health of employees, but also for improving the work environment. For this purpose, a company must have an internal committee set up in which employer and employees are equally represented.

Background information on applicants

5 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

No. Background checks are confidential and the results cannot be published or delivered to third parties.

6 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

The law requires at least one medical examination prior to employment and one when the employment relationship is over. Based on certain regulatory requirements, and depending on the type of job, medical examinations will be required from time to time.

7 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

This kind of examination cannot be directly requested, but may be included in the medical examination at the commencement of a job. Alcoholics and drug addicts cannot be barred from employment, although drinking alcohol or taking drugs on the job can be prohibited as the law prohibits bringing drugs and alcohol into the workplace and taking or drinking them there.

Hiring of employees

8 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

In the public sector the law is aimed at procuring a balance between the number of men and women hired. For minority sectors, a specific number of points is assigned to the score needed to fill a public position.

The law states that when an employer from either the public or the private sector has more than 25 employees, at least 4 per cent of personnel must be disabled people or individuals who take care of disabled persons.

A new type of employment agreement has been created for young adult workers, between 18 and 26, to enter into a relationship of employment. The minimum percentage for this kind of agreement will be set in a regulation and is mandatory for employers. One year of social security taxes normally paid by employers will be covered by the state, if the salary is less than or equal to two times the unified base salary for workers in general. In addition, the number of employment agreements for young adults cannot exceed 20 per cent of the total payroll of stable workers in each company.

9 Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Yes, employment agreements have to be in writing and must fulfil the minimum requirements that are stated on the forms drawn up by the Ministry of Labour. These requirements are not included in the law. The essential terms are:

- agreement between the parties;
- the worker's provision of lawful and personal services (meaning the worker himself, as opposed through another person, has to provide the service);
- relationship of dependence or subordination, which means that the worker is required to be subject to the employer's orders and

instructions (the employer establishes the schedule, place of work, manner in which the job has to be done and so on); and

- payment of a salary.

After the employment agreement is signed, it has to be uploaded on the Labour Ministry's webpage.

10 To what extent are fixed-term employment contracts permissible?

In general, fixed-term employment contracts are prohibited. Nevertheless, there are certain forms of employment similar to fixed-term employment.

- piecework contracts: when the worker takes under his charge the execution of a specific work in exchange for remuneration for the entire job, without considering the time invested to carry it out;
- contract for a specific work or service that is part of the course of the business. Once the job or activity for which the worker was hired is completed, the employment relationship will end;
- incidental contracts for satisfying the employer's special demands, such as for replacing personnel on vacation, leave, sick leave, maternity leave and like situations;
- seasonal contracts that, owing to custom or collective hiring, are executed between a company or employer and a worker or group of workers, to carry out cyclical or periodic work. Owing to the discontinued nature of the work, this kind of contract confers stability, understood as the worker's right to be rehired each season as required;
- casual contracts for attending to urgent or special needs not related to the employer's regular business. The duration cannot be more than 30 days a year; and
- job-by-job basis: The work is done by piece, fragments, surface measurements, and in general, units of work, and remuneration is agreed for each one of them, regardless of the time invested to get the job done.

11 What is the maximum probationary period permitted by law?

Contracts generally provide for a legal trial period of 90 days, but the parties may waive the trial period.

12 What are the primary factors that distinguish an independent contractor from an employee?

What distinguishes the two types of contract is the relation of dependency and decision. Mainly, the relationship with the individual's freedom to act, meaning the level of dependency in the manner of acting. Independent contractors have more independence than employees. On this point, there are various rulings that might be considered contradictory in some cases. In summary, the rulings state that individuals who may work without a schedule, without having to report each day to another person, or individuals who independently perform their jobs and do so, by their own criteria and decision, without receiving a fixed remuneration, but charging for the service provided through invoices, are independent contractors. The individual's invoices must be in his or her name and include his or her taxpayer identification number.

13 Is there any legislation governing temporary staffing through recruitment agencies?

No. This is prohibited in Ecuador.

Foreign workers

14 Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

In general, the law stipulates a maximum percentage of 20 per cent with respect to foreign employees, meaning at least 80 per cent of personnel must be Ecuadorians. For contracts with the state, the stipulated percentage of 20 per cent may be slightly raised. Legal representatives and attorneys-in-fact are not subject to limits in terms of the number of foreigners, but are with respect to the company's capital and assets. The company's capital or capital and assets must be at least US\$25,000. If there is more than one foreigner in the company requesting a legal representative or attorney-in-fact visa, an additional US\$12,500 will be required.

15 Are spouses of authorised workers entitled to work?

No. Based on the spouse's visa, a dependant's visa may be obtained for family members. This visa does not allow the spouse to work.

16 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

In accordance with the law, the foreigner must have a resident's visa for Ecuador enabling him or her to work. If the foreigner does not, then the company will have to obtain a work visa for him or her. Likewise, foreigners without a work visa may provide professional services for a period of not more than 180 days.

If a foreigner without a visa is hired and works more than 180 days for a company, the foreigner will be deported and the company fined.

17 Is a labour market test required as a precursor to a short or long-term visa?

Based on Ecuadorian legislation, it must be proven that there are no qualified personnel in the country to fill the position in question. However, this rule has certain exceptions, especially when the contract is with the state and is of national interest. Furthermore, this condition may be avoided with the commitment to train Ecuadorian or foreign residents in Ecuador in the area for which the visa is requested.

Terms of employment

18 Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

Yes. The maximum work shift is eight hours a day and not more than 40 hours a week. Saturdays and Sundays are considered mandatory days of rest.

There are special shifts accepted for certain sectors, such as the case of underground work or work by adolescents.

A night shift is between 7pm and 6am and may have the same duration as the day shift and the same wages, although increased by 25 per cent.

Per an agreement with the workers and with the prior approval of the Labour Ministry, special work shifts may be established for a job. If the shift is more than eight hours a day or 40 hours a week, the additional time will be regarded as overtime, paid with a surcharge.

For work done beyond the eight-hour workday or 40-hour week, the worker is entitled to overtime pay.

Upon the prior agreement between the employer and workers, and with the approval of the Labour Ministry, in special cases the length of employment cannot be more than six months, but may be renewed for another six months on a onetime basis, the work shift may be reduced by up to 30 hours a week. Furthermore, and also on an exceptional basis, the work shift may be modified to exceed eight hours a day, but without surpassing the maximum of 40 hours a week or 10 hours a day. In this case, the work shift may be distributed irregularly throughout the five working days a week.

19 What categories of workers are entitled to overtime pay and how is it calculated?

Overtime that is paid at time and a half and at double time cannot exceed four hours a day or 12 hours a week. If overtime is performed during the day or up until 12am, the employer has to pay wages at time and a half for each hour of overtime. If overtime is between 12am and 6am, the worker is entitled to overtime pay at double time. To calculate overtime, the worker's hourly wage for the day shift is used as the base.

To calculate overtime pay, the monthly salary is divided by 240 hours to obtain the hourly wage to which 50 per cent or 100 per cent thereof is added.

20 Can employees contractually waive the right to overtime pay?

No. Only employees with duties of trust are not entitled to charge for overtime. In general, those employees hold the highest positions in the company and are in charge of managing its different areas.

21 Is there any legislation establishing the right to annual vacation and holidays?

Besides Saturdays and Sundays, mandatory days of rest are: 1 January, Good Friday, 1 and 24 May, 10 August, 9 October, 2 and 3 November, and 25 December.

All workers are entitled to vacation each year for an uninterrupted period of 15 days, including non-working days. This right cannot be replaced with payment for vacation days. In addition, workers who have provided services for more than five years to the same company or the same employer are entitled to one extra day of vacation for each year after five years or may receive money for the salary corresponding to the extra days.

Workers under 16 are entitled to 20 days of vacation, and workers over 16 but under 18 to 18 days of vacation each year.

Extra vacation days because of seniority cannot exceed 15 in total, unless more vacation days are granted pursuant to an individual or collective contract.

22 Is there any legislation establishing the right to sick leave or sick pay?

In the case of a non-occupational illness or non-job-related accident, if the employee is not enrolled in the IESS or is not yet entitled to the IESS health care service, then the employer has to pay the worker. The amount to be paid is 50 per cent of the worker's salary in the case of a non-occupational illness, up to two months each year, based on a prior doctor's certificate stating that it is impossible for the employee to work or that the worker is in need of rest.

When the employee is entitled to seek medical attention from the IESS and the employee's absence is not owing to an occupational illness or to a job-related accident, the employer pays only 50 per cent of the salary for the first three days. In general, employees are enrolled with the IESS. If the employer fails to enrol an employee, the employer will have to pay 100 per cent of social security taxes, plus interest and fines. In certain cases, the worker may not have yet met the minimum requirements for being able to access the service and for the IESS to assume the payment.

In the case of absence caused by non-occupational illnesses or accidents, the employer must keep the employment agreement in force, without paying salary except in the cases listed above, for a period of one year. When a worker is granted permission or when it has been declared that the worker is in service commission for up to one year, the worker is entitled to receive salary for up to six months. The employee must have been employed for over five years, but not less than two years of work with the same company, to be a scholarship recipient in order to study abroad a subject related to his job. Also, permission may be granted to the worker to specialise in the country's official establishments, as long as the company has at least 15 workers and the number of scholarship recipients does not exceed 2 per cent of the total number of workers. When returning to the country, the scholarship recipient must provide his or her services to the same company for at least two years.

23 In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

All female workers are entitled to 12 weeks of compensated leave for the birth of their child. In the case of multiple births, the time period is extended 10 extra days. Absence from work is justified by submitting a certificate from a doctor from the IESS or other professional. The certificate should state the likely or actual date of delivery. In this case, 25 per cent of the worker's salary is paid by the employer and 75 per cent by the IESS.

The father has the right to 10 days of compensated leave for the birth of his child, in the case of normal deliveries. For multiple births or delivery by Caesarean, the leave is extended an additional five days.

In the case of premature babies or newborns requiring special care, compensated paternity leave is extended another eight days. If the newborn has a degenerative, terminal or irreversible illness, or a severe disability, the father may receive 25 days of compensated leave. These circumstances have to be justified by submitting a medical certificate by a doctor from the IESS or otherwise another professional.

In the case of the mother dying during delivery or maternity leave, the father may use the entire or remaining leave of the mother, respectively. Both mother and father are entitled to 15 days of leave for the adoption of a child, which starts on the date the child is delivered.

The right of workers to maternity/paternity leave has been improved. Once the maternity or paternity leave is over, the mother or father may request an optional and voluntary, uncompensated leave for up to nine-months more to care for their children. The leave also applies in the case of adoptive parents.

Furthermore, female and male workers are entitled to 25 days of compensated leave for the medical treatment of children with degenerative illnesses.

In the case of justified absence for military service or for filling mandatory public positions, workers are granted one month of uncompensated licence, although that time may be extended by agreement of the parties.

24 What employee benefits are prescribed by law?

With regard to salary, employees must receive pay equal to at least the minimum wages and salaries set by the Labour Authority. In addition to their salaries and wages, workers are entitled to receive the following:

- Christmas bonus or a thirteenth salary: The equivalent of one-twelfth of what the worker earned in the 12 months between 1 December of the previous year and 30 November of the year in which payment is made.
- School bonus or a fourteenth salary: One unified base salary that is paid once a year. Presently, the unified base salary is US\$366.
- Employers or companies must also pay employees 15 per cent of net profits. Ten per cent is distributed among the company's employees regardless of their salaries for the corresponding year. The remaining 5 per cent is paid directly to the company's employees in proportion to their dependants, which are the employee's spouse, children under 18 and disabled children regardless of age. When a worker has not completed a full year of work, he or she will receive the proportional part corresponding to the time of service.
- Profits shared with workers cannot exceed 25 times the unified base salary for workers in general. Any surplus has to be delivered to the IESS joint service system.

Other employment benefits in addition to those listed above, such as the benefits for pregnant women

The employer is obligated to discount from the worker's salary a sum corresponding to the worker's personal contributions to the IESS. This is 9.45 per cent of the worker's salary in general; the employer's contribution is 11.15 per cent. In addition, workers employed for at least 25 years on a continuous or interrupted basis are entitled to receive an employer-paid pension.

Workers who have provided 25 years of service to the same company are entitled to receive retirement pay from their employer; if the worker is dismissed before completing the 25 years, but has worked for the same employer 20 years or more, the worker will receive the proportional part of employer-paid pension.

The law guarantees the freedom to form unions and the employer must provide the facilities for this purpose.

Employees have the right to strike. Although the law prohibits dismissal during the formation of a labour organisation or when there is a strike, in practice a worker may be fired, such as when workers take over the workplace during a strike. The employer must pay extra compensation when the dismissal is without just cause.

Workers receive indemnification when they suffer from an accident on the job or an occupational illness, except where that accident or illness is covered by the IESS or is the consequence of the worker's negligence.

Dining areas are provided for workers when they total at least 50 in number at the factory or company and the workplace is located more than two kilometres from the closest town.

Elementary schools must be constructed to benefit workers' children when permanent work centres are located more than two kilometres from the town and as long as the school population is at least 20 children. Besides this, there are other corporate obligations concerning illiterate workers.

If factories or other companies have at least 10 workers, stores with basic commodities must be set up with the commodities sold at cost to their workers and workers' families in the quantities necessary for their subsistence. Companies have to comply with this obligation directly by opening their own commissaries or by contracting this service from other companies or third parties.

Workers must be timely supplied tools, instruments, and materials necessary for performing their work, in conditions that are appropriate for doing the job.

Workers are granted the time necessary for voting in popular elections established by law, but not more than four hours, as well as the time necessary for receiving care from the General Security Office for Individual and Family Health of the Ecuadorian Social Security Institute, or for meeting judicial requirements or notifications. Permission is granted without any salary deductions.

Employment certificates are issued to the worker free of charge and as many times as requested. When the worker leaves permanently, the employer is obligated to grant him or her a certificate, stating:

- the time of service;
- the kind or kinds of job; and
- the salary or wages earned.

There is also payment to workers to cover their round-trip fare, lodging and meal expenses when they are required to travel on business.

Fifty per cent of the fines imposed on the worker for failure to perform his or her employment contract is delivered to the association to which the fined worker belongs.

Companies with at least 100 workers are obligated to contract the services of a qualified social worker. Companies with at least 300 workers must contract an additional social worker for every 300 workers in excess.

Each year, the employer has to provide without cost at least one set of work clothes to anyone providing services.

Workers are entitled to three days of fully compensated leave in the case of the death of a worker's spouse or common-law spouse or relatives at a secondary level of blood or family relation.

The monthly payrolls stating the individual- and employer-paid social security taxes and discounts and payments of the reserve fund, stamped by the appropriate IESS department, have to be posted in a place where they may be viewed by all workers.

Unemployment insurance was amended and now may be accessed by people whose social security taxes have been paid at least 24 times and who have been unemployed for no fewer than 60 days. Unemployment pay is provided for five months at a decreasing rate and as long as the worker does not start providing services.

25 Are there any special rules relating to part-time or fixed-term employees?

Part-time work is an exception and the same rules as for full-time employees must be observed. Save for the specific exceptions listed in question 10, fixed-term contracts are not allowed in Ecuador.

Post-employment restrictive covenants

26 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

An employee is under an implied duty of secrecy or confidentiality, but these rules can be further expanded in the employment agreement and to post termination.

Criminal or civil action may be pursued to demand damages and the legal or contractual compliance with the confidentiality obligation. In many cases, however, it is difficult to prove non-compliance and the tables could turn on the employer especially in criminal action.

Conversely, an employee cannot be demanded not to do a certain job, since that would go against the freedom to work. However, a bonus could be given to a worker to not do a certain job. Even in that case, however, it would be questionable because the right to work is one of the human rights enshrined in the Constitution.

27 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Ecuadorian legislation does not include this payment. If, however, an agreement is reached with the employee, and the employee accepts certain restrictions regarding his or her freedom to work, he or she could sue for monetary damages because of that restricted freedom.

Liability for acts of employees

28 In which circumstances may an employer be held liable for the acts or conduct of its employees?

The employer is held liable in any case in which the employee causes damage to a third party or to third-party property while performing his work, for any reason, including the worker's negligence. Payment may be recovered from the employee, if proven that the employee failed to follow express instructions or acted under the influence of alcohol or drugs.

Taxation of employees

29 What employment-related taxes are prescribed by law?

Income tax.

Employee-created IP

30 Is there any legislation addressing the parties' rights with respect to employee inventions?

If the invention is the product of the work for which the employee was hired, then for material and economic purposes it will be deemed that the invention is the property of the company or the employer. However, moral rights must be acknowledged, meaning the name of the person who created the invention has to be stated. If the invention is not related to the employee's job, then the invention will belong to the employee.

31 Is there any legislation protecting trade secrets and other confidential business information?

The Intellectual Property Law governs these aspects, and special laws provide supplement criminal rules.

Data protection

32 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

The Ecuadorian Constitution establishes that the collection, filing, processing, distribution or disclosure of personal data or requests for information either require authorisation from the person in question or have to be required per the law. Any information collected has to be informed to the interested party, in this case, the worker. Likewise, the employee has the right to know how the information will be used, the purpose, source and use of the personal information, and the time the file or the data bank will be in effect.

Employers and workers or former workers have to create a user name and secret password at the Labour Ministry in order to access confidential information. Users are the only ones responsible for the proper or improper use of their password and the data logged onto the system. The Labour Ministry may use such data in all of its work-related legal processes.

Business transfers

33 Is there any legislation to protect employees in the event of a business transfer?

If a business is sold or transferred, the new owner will be obligated to keep the employees and take over the rights and obligations in retroactive fashion.

When a business closes, the employees receive severance pay equal to compensation for dismissal without prior notice.

Termination of employment

34 May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employee may be fired only for a just cause, which has to be qualified by a labour inspector; the unique and specific causes are listed in question 36.

35 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Employees can notify the termination of their employment agreements; the employer cannot. See the cases listed in question 10.

If the employee or employer notifies the desire to terminate the employment contract without just cause, the employee will receive a bonus equal to 25 per cent of his or her last monthly salary for each year of service.

36 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

A worker cannot be fired without a prior notice, since it would be regarded as a dismissal without prior notice. An employee may be fired at any time, receiving the severance pay established in the law and that is detailed in question 37. If the dismissed employee is a union leader or a pregnant

woman, a claim could be filed to annul the dismissal. In this case, the employer would be obligated to keep the worker in his or her position.

The only way to legally terminate an employment agreement without having to pay severance is to secure official approval, which is authorisation to dismiss a worker. The causes for obtaining approval to dismiss are:

- repeated or unjustified tardiness or absence from work or abandonment of work for more than three consecutive days, without a just cause and as long as such causes occur within one working month;
- serious indiscipline or disobedience of legally approved internal regulations;
- worker's lack of probity or immoral conduct;
- serious slanderous remarks against the employer or the employer's spouse, or common-law spouse, parents, grandparents, children or grandchildren, or representative;
- worker's manifest ineptitude in his or her job or post to which the worker had committed;
- groundless accusations made against the employer with regard to his or her social security obligations; or
- failure to take safety, preventive or health measures, as required by law or regulations or by the appropriate authority; or, conversely, failure to follow a doctor's prescriptions and orders without due justification.

37 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

If the employee or employer notifies the appropriate authority about the desire to terminate the employment contract without a just cause to do so, the employee will receive a bonus equal to 25 per cent of his or her last monthly salary for each year of service.

Furthermore, if the employer does not secure official approval to dismiss the employee, said bonus and the following must be paid.

Severance pay corresponding to a dismissal without cause, in addition to the bonus for a dismissal with the official approval explained above, includes the following:

- up to three years of service: three months' salary; and
- over three years of service: one month's salary per each year of service up to a maximum of 25 months' salary.

If the fired worker had been employed by the same company between 20 and 25 years on a continuous or interrupted basis, he or she will receive the proportional part of the retirement pension.

If a disabled individual or an individual with a disabled person under his or her care who was hired in the disabled person's place is dismissed without a cause, special severance pay equal to 18 months' remuneration must be paid.

38 Are there any procedural requirements for dismissing an employee?

Yes. The administrative process, called Visto Bueno, is the official approval process and is conducted through a labour inspector.

39 In what circumstances are employees protected from dismissal?

If a pregnant woman or a woman on nursing leave or a union leader is dismissed without a just cause, the dismissal is not valid and the employee may choose whether to return to work or to receive additional severance pay equal to 12 months of salary.

Employees cannot be dismissed when a collective bargaining contract is under negotiation.

40 Are there special rules for mass terminations or collective dismissals?

Up until last year, a rule was in place prohibiting dismissals with prior notice within a period of 30 days for more than two employees if the company had up to 20 employees, or more than five if the company had more than 20. That rule has been since repealed.

41 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Actions are processed on an individual basis.

42 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The private sector cannot force a worker to retire, but the state sector can. The retirement age is 65 years and the state may force an employee to retire at the age of 70.

Dispute resolution

43 May the parties agree to private arbitration of employment disputes?

No, because jurisdiction is exclusive to the labour court. Nonetheless, mandatory mediation is promoted at the same Labour Ministry.

44 May an employee agree to waive statutory and contractual rights to potential employment claims?

No. Based on the Constitution, workers' rights cannot be waived.

45 What are the limitation periods for bringing employment claims?

Three years.



Patricia Ponce

mpponce@bustamante.com.ec

Av. Patria E4-69 and Av. Amazonas
Cofiec Building, 4th, 5th, 10th, 11th & 16th floors
Quito
Ecuador

Tel: +593 2 256 2680 ext. 235
Fax: +593 2 256 4069
www.bustamanteybustamante.com.ec

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Labour & Employment
ISSN 1750-9920



THE QUEEN'S AWARD
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law