



**SUMMARY OF MOST IMPORTANT LABOR AND EMPLOYMENT LAWS**  
**APPLICABLE TO EMPLOYERS IN PUERTO RICO<sup>1</sup>**  
**Rev. June 2013**

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<sup>1</sup> *This document contains an overview of the local employment legislation that applies to operations in Puerto Rico. It is not intended as legal advice. It seeks to apprise our friends and colleagues on the legal issues that bear upon their management of their human resources in Puerto Rico. Readers should seek counsel specific to their particular circumstances to ensure legal compliance. In case of questions feel free to contact Sylmarie Arizmendi, Esq., [smarizmendi@arizmendilaw.com](mailto:smarizmendi@arizmendilaw.com).*

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## NON-EXEMPT EMPLOYEES

The following provisions are applicable only to non-exempt employees. Exempt employees generally include "executives," "administrators" and "professionals". These are not entitled to the benefits described in this section of the summary. Outside sales professionals are also considered exempt for certain purposes.

Regulation No. 13, Fifth Revision (2005), of the Minimum Wage Board, defines exempt executive, administrative and professional employees under local law, as well as the term "outside sales employee". The definitions of Regulation No. 13 closely follow the Fair Labor Standards Act ("FLSA") regulations as effective on August 23, 2004.

As under the federal regulations, "outside salespersons," also referred to in Puerto Rico as "traveling agents,"<sup>2</sup> are generally exempt from overtime pay and minimum wage requirements. Said employees would be entitled, however, to vacation and sick leave benefits, and a weekly rest period, just as the non-exempt employees.<sup>3</sup>

The FLSA regulations apply to all FLSA covered employers in Puerto Rico. Following is a summary of how local law and FLSA interact:

- Administrators, executives and professional employees are exempt under both local law and FLSA. Because the definitions of said exemptions under local law follow the federal regulations, such employees will be exempt from all forms of overtime.
- Outside sales employees are defined the same under both local and federal law, but these employees are only exempt from daily and weekly overtime as well as from the meal period penalty. They are, however, entitled to seventh consecutive day of work overtime at double their regular rate.
- FLSA-exempt employees in other exemption categories with no local law counterpart, such as inside sales employees, are also exempt under Puerto Rico law for purposes of weekly overtime. They are not, however, exempt from daily overtime, seventh consecutive day of work overtime or the meal period penalty.

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<sup>2</sup> Puerto Rico's "overtime pay" statute, Law No. 379 of May 15, 1948, 29 L.P.R.A. § 271 *et seq.*, as amended, defines "traveling agents" as employees who exercise the duties of traveling salespersons and whose work consists of carrying out transactions involving the sale of products, services, or any other tangible or intangible goods on behalf of an employer, whether or not the employee personally intervenes in the distribution or delivery of the product, service or goods, including any work or service incidental or related to the main sales activity. The law further provides that, usually, these employees work outside of headquarters; do not return daily; their daily activities are unsupervised once they leave headquarters; they use their own discretion as to the effort and time devoted to their work; and the very nature of their work prevents the determination of real and effective hours worked every day. 28 L.P.R.A. § 288.

<sup>3</sup> The weekly rest period and the vacation and sick leave benefits are discussed further below.

- FLSA-covered non-exempt employees, are entitled to all forms of overtime under federal and local law.
- Where applicable, both daily and weekly overtime for FLSA employees would be paid at time and a half their regular rate of pay, unless a mandatory decree provides a higher rate. Seventh consecutive day overtime, however, has to be paid at double rate, as well as the meal period penalty.
- Employees of employers not covered by FLSA, in contrast, are entitled to daily and weekly overtime at double their regular rate of pay. So in essence a purely local industry would have to pay overtime at a higher rate.

### Wage and Hours: Applicable Law

If an employer's operations utilize interstate commerce channels and have annual gross volume of sales in excess of \$500,000, they will be subject to both the federal FLSA and Puerto Rico wage and hour legislation. As a result, its non-exempt employees will be entitled to the higher benefits provided under federal or local wage and hour legislation.

### Minimum Wage

For employers subject to the FLSA, the federal minimum wage will apply. Said minimum is currently \$7.25.

### Regular Working Hours and Overtime

Under Law No. 379 of May 15, 1948, regular working hours for non-exempt employees in Puerto Rico are eight (8) daily and forty (40) weekly.<sup>4</sup>

All hours worked in excess of eight (8) in any work day must be compensated as overtime.<sup>5</sup> For FLSA covered employers, the daily overtime rate is of is time and a half (1½) the employee's regular rate, unless a mandatory decree, collective bargaining agreement or individual contract of employment provides otherwise. Some mandatory decrees in Puerto Rico require that daily overtime be compensated at double the regular rate. Employers not covered by FLSA must pay daily overtime at double the employee's regular rate.<sup>6</sup>

All hours worked in excess of forty (40) in a week must be compensated as overtime, unless the same number of hours has been compensated as daily overtime at double the employee's regular rate.<sup>7</sup> For FLSA covered employers, the overtime rate is time and a half the employee's regular rate. For employers not covered by FLSA, the weekly overtime rate is double the regular rate.

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<sup>4</sup> 29 L.P.R.A. §§ 271 and 272.

<sup>5</sup> 29 L.P.R.A. § 273(a).

<sup>6</sup> 29 L.P.A. § 274.

<sup>7</sup> 29 L.P.R.A. § 273(b). FLSA employers who compensate daily overtime at time and a half the regular rate should bear this requirement in mind when computing weekly overtime.

### Workday; Workweek

A "workday" in Puerto Rico is defined as eight (8) hours of work in a 24 hour period, and the "workweek" is defined as forty (40) hours of work in a workweek.<sup>8</sup> Work performed in excess of the regular hours is considered overtime and must be compensated as such.

As a general rule, to determine whether an hour worked exceeds the eight (8) hour daily maximum, the twenty-four (24) hour period concluding with the hour in question is examined. This manner of computing daily over-time can result in time worked being considered overtime even when the employee has not worked more than eight (8) hours in any given natural day. This is known as "technical overtime". It can occur when the beginning of the workday or of the second part of the shift is advanced in relation to the previous day. It can also occur when the meal period is delayed in relation to the previous day.

Overtime pay for technical overtime can be avoided if the employee and the employer reach a valid "flextime" agreement. Please see our discussion below on flextime agreements.

A workweek comprises seven (7) twenty-four (24) hour cycles. The first cycle starts on the date and hour determined by the employer, provided the employer gives a fifteen (15) day prior written notification to the employees. Otherwise, the workweek will be considered to begin each Monday at 8:00 A. M.

### Meal Periods

Meal periods are also regulated by Law No. 379, *supra*.<sup>9</sup> All non-exempt employees are entitled to enjoy a one (1) hour meal period, which must commence after the conclusion of the third (3<sup>rd</sup>) consecutive hour and before the commencement of the sixth (6<sup>th</sup>) hour of work. The idea is that no employee should work more than five (5) consecutive hours without pausing to eat. Only pursuant to a previous authorization from the local Secretary of Labor and Human Resources may the meal period be enjoyed between the second (2<sup>nd</sup>) and third (3<sup>rd</sup>) consecutive hours of work.

Work done during the meal period must be paid at double the regular rate of pay. This is not considered overtime, but a penalty for a meal period violation.

Law No. 379 establishes that the meal period may be reduced to as little as thirty (30) minutes for the convenience of the employee and the employer, by means of a written

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<sup>8</sup> 29 L.P.R.A. §§ 271, Regulation 2952 to Define the Workday and the Workweek and to Establish the Commencement of the Workday and the Workweek, adopted by the Secretary of Labor on January 3, 1983.

<sup>9</sup> 29 L.P.R.A. § 283.

stipulation.<sup>10</sup> Such stipulation will remain in force indefinitely, and the employee may not withdraw his or her consent until after one year.

A second meal period would be necessary if the employee were to work overtime (because an employee must not work for more than five (5) hours without a meal break). This second (2<sup>nd</sup>) meal period can be eliminated through written stipulation between the employer and the employee, provided the employee has not worked more than two (2) hours in excess of the regular daily working hours. The second (2<sup>nd</sup>) meal period can also be reduced by written agreement. (We recommend that, if a reduction agreement is to cover the second (2<sup>nd</sup>) meal period, it specifically say so.)

The employer must affix a printed notice setting forth the daily work schedule, specifying the time for the beginning and end of all meal periods, in a conspicuous place in the establishment.

Outside salespersons or traveling agents are deemed exempt from meal period provisions.

### Flexitime

The employer and the non-exempt employee can enter into an agreement to establish a flexible daily work schedule, or "flexitime".<sup>11</sup> The essential benefit of a flexitime arrangement is that overtime will not be deemed to have occurred by the mere fact of having advanced (from one day to the next) the hour in which the work day begins, or having delayed the hour in which the employee enjoys the meal period. That is, flexitime arrangements eliminate "technical overtime" problems. In any event, however, work performed in excess of eight (8) hours in a natural day will always be paid as overtime.

The law creates certain requirements, which must be strictly observed in order to establish valid daily flexitime schedule. These requirements are as follows:

- The employer must not retaliate against an employee for the mere fact of refusing to accept a flexitime arrangement.
- The employee must have a rest period of not less than twelve (12) consecutive hours from the end of the work shift on the previous day and the beginning of the flexitime work shift the following day.
- Once the work shift begins, it must be completed consecutively, uninterrupted except for the mealtime period.

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<sup>10</sup> The only employees who can enjoy a meal period of less than thirty (30) minutes are croupiers, nurses and security guards, who by stipulation with their employers can enjoy a meal period of no less than twenty (20) minutes.

<sup>11</sup> 29 L.P.R.A. §§ 273a and 282.

Law No. 7 of January 4, 2002 amended the flextime provision to require employers to consider with priority requests for such arrangements made by employees who are heads of family with sole custody of minor children.

Flextime can be beneficial if the starting hours or the mealtime period(s) are altered with some frequency and the employees affected are working essentially eight (8) hours a day. It is not always feasible or desirable, however, to establish or grant flextime.

### Weekly Rest Period

Law No. 289 of April 9, 1946,<sup>12</sup> establishes a weekly rest period. Every non-exempt employee is entitled to twenty-four (24) consecutive hours of rest for every six (6) consecutive days of work, even if the employee only works a fraction of each of these workdays. Any work done by a non-exempt employee on this day of rest must be paid at double the rate stipulated for regular hours. The weekly rest period requirements apply to outside sales employees or "traveling agents."

### Closing Law

Commercial establishments which sell merchandise directly to its customers (typically stores), are subject to the Puerto Rico Law to Regulate the Operation of Commercial Establishments ("Closing Law", Law No. 143 of November 16, 2009).<sup>13</sup> Key requirements of said law are as follows:

- Stores must remain closed to the public on the following holidays: January 1 and 6, Good Friday, Easter Sunday, Mothers' Day, Fathers' Day, General Elections, Thanksgiving and December 25.
- Stores must remain closed to the public from 5:00 a.m. to 11:00 a.m. on Sundays.
- In the discretion of the person in charge of the establishment, certain maintenance work and work related to the continuance of operations may be performed during holidays or Sunday closing hours.<sup>14</sup>
- The following establishments are exempt from the closing requirements:
  1. establishments operated solely by their owners or certain close relatives,
  2. establishments with no more than twenty five (25) employees in their weekly payroll, including temporary employees,
  3. commercial establishments inside hotels, airports, seaports, and in facilities dedicated to cultural, recreational, sports or handcrafting activities,
  4. establishments dedicated mainly to the preparation of food and direct sales to the public of meals,
  5. libraries or kiosks that sell of books, magazines, periodicals or musical or literary recordings,
  6. establishments in "plazas del mercado",

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<sup>12</sup> 29 L.P.R.A. § 295.

<sup>13</sup> 29 L.P.R.A. §§ 301 *et seq.*

<sup>14</sup> Before, special permission from the Secretary of Labor was required for work during mandatory closing hours.



7. establishments that operate as part of a funeral homes or cemetery,
  8. establishments inside zones designated as touristic, antique or historical or those dedicated mainly to the service or sale of articles of tourist interest,
  9. pharmacies, and
  10. gas stations as well as the commercial establishments located in them.
- There are limitations on the kind of products that pharmacies may sell during otherwise restricted hours (medication with and without prescription, health, personal hygiene and baby products, school effects, books, magazines and candy).
  - Work performed anytime on Sundays must be paid at a minimum hourly rate of \$11.50,<sup>15</sup> except work performed in establishments identified in numbers 1, 2, 3, 4, 5, 6 and 7 of the of the preceding list, as well as in galleries or kiosks that sell works of art or Puertorrican handcrafts.

### Holidays

As long as an employer is not subject to the Closing Law, it will not be required to close during statutory holidays, or to grant said holidays with or without pay. Of course, there are many holidays that are customarily recognized and paid. We recommend that you follow industry practice in this respect, unless there are strong business reasons to proceed otherwise. Please be aware, however, that paid holiday time does not have to be considered for overtime pay calculations under the applicable law.

### Vacation and Sick Leave

The following discussion concerning vacation and sick leave applies to non-exempt employees, and outside salespersons/traveling agents.

Under Law No. 180 of July 27, 1998 (“Law No. 180”)<sup>16</sup> these employees are entitled to accrue paid vacation and sick leave. The standard rate provided by Law No. 180 for vacation accrual is of 1.25 days for each month in which the employee works at least 115 hours. The standard rate of sick leave accrual under that law is of 1 day for each month in which the employee works at least 115 hours. This rate, however, may vary depending on the particular industry and on the employee’s date of hire. Generally, if for a particular industry, there is a Mandatory Decree providing a lower accrual rate, or requiring a greater number of hours per month to accrue leave, employees in the covered industry will have the benefits outlined in the decree rather than the greater benefits of Law No. 180. If a mandatory decree, however, provides a greater accrual rate or requires a lesser number of hours of work per month to accrue leave, then said greater benefits will apply only to employees hired before August 1, 1995.

Following is an explanation of the rules regarding how to manage accrued leave. Law No. 180 establishes the following rules in this regard:

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<sup>15</sup> Before, authorized work performed during mandatory closing hours had to be paid at double the employee’s regular rate.

<sup>16</sup> 29 L.P.R.A. §§ 250 *et seq.*

- The use of vacation and sick leave will be considered time worked for purposes of the subsequent accrual of such benefits.
- Vacation and sick leave days will accrue on the basis of the employee's regular workday during the month in which the accrual occurred. For example, if an employee works eight (8) hours per day, she will accrue one (1) day of sick leave of eight-hour duration, each month in which she works the required number of hours. For employees whose work schedules fluctuate, the regular work day will be determined by dividing the total amount of regular hours worked in the month by the total amount of days worked. For employees whose work schedules cannot be determined, vacation and sick leave will be computed on the basis of a regular eight-hour workday.
- Vacation and sick leave will be used and paid on the basis of the regular work day at the time the benefit is used or paid. For example, if an employee's regular work day at the time he goes on vacation is of five (5) hours, and he is taking a ten-day vacation, then he will use ten vacation days of five (5) hours each. This is true even if he accrued the leave during a period when he was working regular days of eight (8) hours. In order to determine the regular work day for purposes of paying or using leave, the employer may consider a period of no more than two (2) months prior to the use or payment of the benefit.
- Vacation and sick leave may not be paid at less than the regular hourly salary earned by the employee during the month in which the leave was accrued. In order to compute the regular hourly salary of an employee who receives a commission or other incentive, which is not entirely at the employer's discretion, the total commission or incentive earned in the year may be divided into fifty-two (52) weeks.
- For employees on a probationary period authorized by law, vacation leave will accrue only upon completion of said period, although this accrual will be retroactive to the date their employment commenced.
- The employee is not entitled to request vacation leave until the leave has been accrued for one (1) year. The employer will grant vacation annually, in a way that will not interrupt its normal operations. The employer will establish the corresponding work shifts for this purpose.
- Generally, accrued vacation leave must be enjoyed consecutively. Nevertheless, by agreement between the employer and the employee, vacation may be split, as long as the employee enjoys at least five (5) consecutive working days of vacation during the year. The law, however, currently does not provide what is the penalty for a violation of this provision.
- By agreement between the employer and the employee, the employee can accumulate up to two (2) years-worth of vacation leave. An employer who does not

grant the vacation leave after this maximum, must grant the total amount accrued up to that point and pay the employee double the rate for the leave accrued beyond two years.

- Upon the employee's written request, the employer may allow the vacation leave to include non-working days within the period in which the vacation is to be enjoyed.
- In the event that the employee ceases his employment, the employer will pay the total amount accrued up to that point, even if it is less than one (1) year.
- Upon the employee's written request, the employer may allow the partial liquidation of accrued vacation leave in excess often (10) days.
- Sick leave not used by an employee during the course of the year will accrue for successive years up to a maximum of fifteen (15) days. In order to encourage the prudent use of sick leave, the employer may (although it is not required to do so) pay the unused excess to the employee.
- Except in cases of *force majeure*, the employee must notify the employer of the fact that he is ill as soon as he realizes that he will miss the beginning of his regular work schedule and no later than the same day of his absence.
- The use of sick leave does not excuse compliance with the employer's valid standards of conduct, such as those pertaining to attendance, punctuality, medical certificates if the absence exceeds two (2) work days, and periodic reports on the status of the illness.

### Uniforms<sup>17</sup>

By virtue of Law No. 180, any employer who requires its non-exempt employees to use uniforms must pay the expenses related to their acquisition. Under no circumstances will the employee be required to contribute, directly or indirectly, totally or partially, to the expenses entailed in that acquisition.

### Payment of Wages

Law No. 17 of April 17, 1931<sup>18</sup> regulates the payment of wages to non-exempt employees. Outside sales employees and traveling agents are not considered exempt for purposes of Law No. 17.

Employers may pay salaries in cash, by check, or by electronic means. Electronic means include direct deposit, electronic transfer to the employee's bank account or by payroll cards, at intervals of up to fifteen (15) days. The employer will be responsible for all costs in

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<sup>17</sup> 29 L.P.R.A. § 250e.

<sup>18</sup> 29 L.P.R.A. § 171 *et seq.*

connection with a direct deposit or electronic transfer system. The payment of salaries in any form other than in cash or by check requires the employee's prior approval.

If an employer pays salaries by means of a check that lacks sufficient funds, it will be subject to a fine equal to double the debt to the employee, or incarceration). In addition, after a hearing, the Secretary of Labor and Human Resources may require the employer to post a bond to ensure compliance with its obligation to pay the salaries of the affected employees. Such bonds may be required for a maximum of two (2) years.

Generally, an employer is prohibited from making deductions from the salaries of non-exempt employees, except as expressly allowed by law. One such exception is the use of payroll deductions towards ERISA<sup>19</sup> covered health benefit plans, pension plans, savings plans and others. These deductions can be made without having to file multiple documents with the Department of Labor and Human Resources to obtain their approval. In relation to non-ERISA group welfare benefit plans, a payroll deduction system might require prior approval from the local Department of Labor. Also, the employer might be required to contribute to the plan in the same amount as the employees. Under an amendment to this law implemented by Law No. 249 of September 28, 2007, however, employees might authorize deductions towards the payment of premiums for individual savings, retirement, health, life, accident or hospitalization insurance plans without the employer having to submit the plan to DOL approval or having to contribute any amounts toward the premiums. In the case of individual plans, the employer may not participate in the plan selection. This amendment also covers group plans under certain conditions.

Other allowed deductions include those towards the purchase of stock or the repayment of loans with certain credit unions, payment of union dues, charity contributions, repayment of certain salary advances, contributions towards certain individual retirement accounts, income tax debt repayment plans, and purchase of the employer's stock. In addition, as allowed by Law No. 82 of June 2, 2008, University of Puerto Rico (UPR) alumni may request that their employers withhold and remit contributions towards the UPR's fund raising campaigns. Employers are required to oblige employee's written requests to this effect. Law No. 17 provides particular requirements for the valid implementation of each of these.

### Record Retention

Various laws require the retention of different records by the employer, with the period of retention varying. As a "rule of thumb," we recommend that payroll records (ie. time cards, salary and benefit payments) be kept for at least six (6) years and not be discarded until three (3) years after termination of employment. Most other employment related records (except for the INS form I-9) need only be retained for five (5) years.<sup>20</sup>

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<sup>19</sup> Employee Retirement Income Security Act of 1974.

<sup>20</sup> See Regulation 6196, Regarding the Preparation and Conservation of Payroll Records, adopted by the Secretary of Labor on September 20, 2000.

## **ALL EMPLOYEES**

The following provisions are applicable to both exempt and non-exempt personnel, including "traveling agents."

### New Hire Reporting

Federal and Puerto Rico law require employers to give certain information about their newly hired employees to the state's Directory of New Hires.<sup>21</sup> This report must be made within twenty (20) days of hiring. According to Law No. 169 of December 18, 1997, Puerto Rico's Directory of New Hires is managed by the Child Support Administration ("Administración para el Sustento de Menores" or "ASUME").

Employers can comply with both the federal and local new hire reporting laws by forwarding to ASUME the official form it has issued to effect compliance (Form ASM-5). (The employer can also use the W-4 form or a form of its own creation that ASUME will review for compliance.) Where the employer transmits information electronically, it must do so at least twice a month, in intervals not shorter than twelve (12) nor greater than sixteen (16) days.

The general ASUME statute, Law No. 5 of December 30, 1986, as modified by Law No. 169, (8 L.P.R.A. Sec. 530(b)), provides that any violation of that law for which no specific penalty has been set will constitute a misdemeanor. A court may find civil or criminal contempt for violating its orders under said law or those of the ASUME Administrator or its Administrative Law Judges (ALJs). The Administrator or ALJs may also impose a fine not to exceed five hundred dollars (\$500).

### Employment of Minors<sup>22</sup>

There are specific laws and regulations covering the employment of minors under eighteen (18) years old. Further, the general rule is that no minor under sixteen (16) years of age may be employed either formally or informally in any gainful enterprise. However, there are several exceptions to this, such as is the case with certain apprenticeship programs sponsored by the government.<sup>23</sup> Should you need more information regarding employment of minors, please feel free to contact us.

### Employment of Aliens

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<sup>21</sup> According to Law No. 169 of December 18, 1997, the report must include the employee's name, address, social security number, date of birth, date of hire and state of hire. It should also include the employer's name, address and federal or local identification number.

<sup>22</sup> 29 L.P.R.A. §§ 431 *et seq.*

<sup>23</sup> 29 L.P.R.A. § 479.

Local Law No. 48 of May 29, 1973<sup>24</sup> prohibits employers from knowingly employing an alien without legal residence in the U.S., or to employ an illegal alien when a reasonable investigation would have revealed that he was not a legal resident. This prohibition does not apply to aliens who have a temporary work permits from the U.S. Immigration and Naturalization Service.

A “reasonable investigation” includes verification of a birth certificate, appropriate visa documentation and certificate of registration for selective service in the armed forces.

Employees who are terminated without just cause motivated by his or her actions (such as misconduct or poor performance) and who are replaced by an illegal alien, are entitled to reinstatement and back-pay.

The local law complements the federal U.S. Immigration Reform and Control Act of 1986 (IRCA), which requires employers to hire only United States citizens and aliens who are legally authorized to work in Puerto Rico. All employers must verify the employment eligibility of newly hired employees.

### Employment Contracts

Except in the case of probationary and temporary employment contracts, generally a written employment contract is not required under Puerto Rico law. Probationary and temporary contracts, however, are subject to specific requirements. (See discussion of temporary contracts and probationary contracts further below). There are certain conditions of employment, however, that do need to be in writing, such as the following:

- flextime agreements,
- meal period reduction agreements,
- agreements to eliminate the second meal period and
- covenants not to compete.

Each of these is subject to specific conditions of validity. In the case of covenants not to compete, these requirements are to be found in judicial decisions and include a maximum non-competition period of twelve (12) months.

### Discharge Indemnity

Law No. 80 of May 30, 1976<sup>25</sup> provides that any person employed for an indefinite period of time, who is dismissed without "just cause", is entitled to receive from his employer an indemnification that will depend upon the length of service with the employer.

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<sup>24</sup> 29 L.P.R.A. §§ 153-154.

<sup>25</sup> 29 L.P.R.A. §§ 185a *et seq.*

In the case of an employee dismissed during the first five (5) years of service, the indemnity will be two (2) month's salary, plus one (1) week's salary for every complete year of service. If the employee has more than five (5) years and up to fifteen (15) years of service, the indemnity payment will be three (3) month's salary, plus two (2) weeks salary for every complete year of service. After fifteen (15) years of service, the indemnity will be six (6) month's salary, plus three (3) week salary for every complete year of service.

The indemnity is computed on the basis of the highest compensation the employee may have received within the last three years of employment. The payment is to be issued free from any withholding and, under circumstances described further below, may also be deemed tax exempt.

All personnel, including management, are covered by this law, except those whose probationary period has not expired or those subject to a valid temporary employment contract.

Under Law No. 80, liability is avoided only if just cause exists for the dismissal. Just cause is defined as follows:

- a. A continuing pattern of improper or disorderly conduct.
- b. An attitude of not carrying out work in an efficient manner, or doing it tardily, negligently, or in violation of the company's quality standards.
- c. Repeated violations of reasonable rules and regulations for the establishment's operation, if written copies thereof have been previously provided to the employee.
- d. Total, temporary or partial closing of operations. In this regard, closing of one facility of several that an employer may operate is considered just cause.
- e. Technological changes or reorganization, such as in the style, design or character of the product manufactured or handled, or changes in services rendered to the public.
- f. Employment reductions made necessary by a reduction in production volume, sales, or profits, foreseen or prevailing at the time of dismissal.

In the event of dismissals for reasons (d), (e) and (f) above, the employer must retain with preference those employees of greater company seniority within their occupational classification. This seniority provision does not apply to temporary layoff situations, which last less than three (3) months. However, in both dismissal and layoff cases, the employer must preferentially rehire employees according to seniority, provided positions in the same job classification become available within six (6) months of the date of the discharge or layoff. Seniority need not be followed if the employer establishes a "clear and uncontested" difference in the capability or efficiency of the less senior employee.

Seniority within an occupational classification is determined on the basis of the establishment<sup>26</sup> (physical place of business) where the reduction in force occurs. However, if employees are

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<sup>26</sup> The term "establishment" refers to the particular facility affected by the closing, and not to the totality of the employer's operations in the island. Law No. 95 of July 30, 2007.

usually and regularly transferred from one establishment to another or the establishments do not operate substantially independently regarding personnel matters, seniority may have to be determined on a company-wide basis.

Law No. 278 of August 15, 2008 amended Law 80 to provide that, when an employer pays severance to employees terminated for just cause under subsections (d), (e) and (f) referred to before, said “special compensation” is exempt from local income tax. Law No. 278 states that such “special payments” will not prevent an employee from claiming wrongful termination under Law No. 80 and will not reduce the compensation a successful complainant may recover under that law.

### Probationary Periods<sup>27</sup>

Puerto Rico law allows probationary periods reasonably related to required employment skills. All probationary labor contracts (1) must be in writing; (2) must state the beginning and end of the probationary period; (3) must be executed before the employee actually begins to work; and (4) must not exceed ninety (90) days, unless a written permit is issued by the Puerto Rico Secretary of Labor, who may authorize the extension of the probationary period up to ninety (90) additional days. Any extension must be sought prior to the lapse of the initial probation period.

The employer may discharge an employee within the probationary period without just cause without being liable for the discharge indemnity provided under Law No. 80, *supra*. A probationary period, however, does not allow the employer to terminate an employee for illegal reasons, such as prohibited discrimination.

An employee who has been hired pursuant to a temporary employment contract (a temporary employee) may not be placed on probation. A temporary employee who becomes a regular employee, however, may be placed on probation during the commencement of his regular employment. Where the regular employment is in a position that entails the same duties or responsibilities as the previous temporary job, the employee is entitled to credit his temporary employment time towards his probation time, up to a maximum of half the probation time required by the employer.

### Temporary Employment Contracts<sup>28</sup>

As mentioned before, liability under Law No. 80, *supra*, may be avoided through a *bona fide* temporary employment contract. To classify as such, this contract must:

- be in writing, and signed by the employee during the first day of work, or during the first ten (10) days, if the employee is hired through a temporary employment services company;

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<sup>27</sup> 29 L.P.R.A. § 185h.

<sup>28</sup> 29 L.P.R.A. § 185k.



- specify that the purpose of the engagement is to:
- substitute an employee on a leave established by law or by the employer, or
- to perform an extraordinary task, or
- to perform a task of specified duration.

Law No. 80 gives the following examples of valid purposes behind a *bona fide* temporary employment contract: to perform annual inventory, repair of equipment, machinery or company facilities, casual loading and unloading of cargo, work during certain times of the year such as Christmas, to fill temporary orders for increased production and any other project or particular activity of short or certain, fixed duration.

Significantly, even a written temporary employment contract that meets the above requirements may lose its *bona fide* status under Law No. 80 if the practice and circumstances involved in the engagement are of such nature that they indicate the creation of an expectation of continued or indefinite employment. Where temporary contracts are customarily renewed, such an expectation may arise and Law No. 80 might require just cause for termination at the end of the term.

As previously noted, employees hired to work for a fixed term or a specific project are not hired for an undetermined period of time and, therefore, are not covered by Law No. 80. In case of discharge prior to the termination of the term, however, these employees have other remedies.

For instance, Article 1476 of the Puerto Rico Civil Code provides that employees who perform manual labor may not be terminated without just cause prior to the end of their contract. Otherwise, they are entitled to damages resulting from the breach, which damages are to be determined on the basis of the salaries they failed to earn, plus any other contractual damages that may be proven.

Employees hired for a specific period of time who do not perform manual labor may invoke general contractual remedies in case of termination prior to the contract term. Whether they are entitled to a remedy will depend on the contract. The parties may, and should, incorporate in the contract the circumstances under which it may be terminated prior to term. Our Supreme Court has cautioned that Law No. 80 provides a frame of reference to evaluate the causes for termination incorporated in the contract, though it has also held that Law No. 80 causes for termination do not apply *per se*. If the termination is found to be in breach of contract, remedies under Art. 1059 of the Puerto Rico Civil Code may include salaries that would have been earned until the contract term, subject to the employer showing that said amount should be reduced. Emotional damages are usually not available unless they were foreseeable when the contract was executed and they are a necessary result of the breach.

Any termination is presumed to violate Law No. 80. In its defense, the employer bears the burden of proving that there is a *bona fide* temporary employment contract. This includes proving that it has not created an expectation of continued employment. The employer must

then prove that the termination is not in breach of the *bona fide* temporary contract. Otherwise, the employer must prove just cause for termination under Law No. 80.

### Employee Health Certificates

Recognizing that the federal “Americans with Disabilities Act” severely restricts an employer’s ability to require medical examinations, Law No. 232 of August 30, 2000<sup>29</sup> eliminated previously existing regulations that allowed employers to demand health certificates from all employees. Today, the health license and certificate requirements apply only to establishments that handle or produce food or beverages, and institutions that provide direct health care services. In those establishments, only those employees who pose a “direct threat” to public health can be required to obtain the certificate. A direct threat is any risk of substantial harm to the health of the individual or the public that may not be eliminated or reduced.

The determination whether an employee poses a direct threat requires an individualized medical determination that the employee’s contagious or epidemic condition would not permit him or her to perform essential job functions. If the determination is made, the employee must be required to submit to medical examination to obtain a medical certification to guarantee that the condition does not pose a direct threat. The person will submit to a medical evaluation which consists of VDRL and tuberculosis testing to determine if he or she suffers contagious diseases that will prevent him or her from performing his or her job without posing a risk to public health.

### Privacy of the Social Security Number and other Personal Information

Law No. 207 of September 27, 2006<sup>30</sup> prohibits employers from showing or displaying an employee’s social security number (“SSN”)<sup>31</sup> in identification cards, places visible to the general public, documents of general circulation, personnel directories or other lists accessible to persons who neither need nor have authority to know an employee’s SSN. The employee may voluntarily waive this protection in writing, but failure to do so must not result in retaliation. As long as the employer takes precautions to maintain confidentiality of the social security number, it may still be used when required by law or regulation, to confirm identity, for tax purpose, for hiring purposes and for payroll purposes. The employer may reveal the SSN to third parties that have adequate measures in place to prevent publication of the information. In such cases the employer must have a list of entities approved to handle this information. The SSN may be electronically or digitally transmitted where there are mechanisms in place to guarantee confidentiality. If at any time any of these records has to be made public for any purpose for which the SSN is not required, the employer must redact the document to eliminate that information. Violations of this law

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<sup>29</sup> 29 L.P.R.A. §§ 411 *et seq.*

<sup>30</sup> 29 L.P.R.A. § 621a and Regulation 7413, regarding Restrictions in the Use of the SSN, adopted by the Secretary of Labor on October 1, 2007.

<sup>31</sup> The term employee excludes independent contractors.

entail a fine of \$500 up to \$5,000 per violation, depending on, among other factors, the number of affected employees.

Further, Law No. 187 of September 1, 2006,<sup>32</sup> imposes certain requirements regarding the use of the SSN by private businesses that provide services to government agencies, state instrumentalities, municipalities and public corporations, to those that bid on contracts to provide services to the public sector, or who receive public funds. These must establish parameters for the protection of the confidentiality of SSNs of persons that have provided such information to them, including but not limited to, employees. As a pre-condition to bid on the provision of services to the public sector, they must guarantee that they will not disclose or reveal the SSN of any individual in identification cards, documents of general circulation or any materials that are accessible or visible to any person within or outside of the entity.

Entities covered by Law No. 187 may still obtain the SSNs for the following purposes: identity verification, implement uniform internal information exchange procedures and transactions allowed by law such as credit checks, investigations or transactions related to tax or human resources administration, compliance with payment of child support orders, and compliance with judicial orders and/or criminal investigations. These entities must ensure, however, that no one is denied services on account of lacking or refusing to provide the SSN unless providing it is required by law. Entities covered by this law will be liable for any damages resulting from non-compliance.

Yet another law, Law No. 243 of November 10, 2006, imposes on the central and municipal governments and their contractors, requirements similar to those of Laws Nos. 207 and 187. Additional uses of the SSN that are expressly allowed by Law No. 243 are audit reports and benefit eligibility.

There is a special law that deals with the protection of personal information, including the SSN, that is electronically stored. Law No. 111 of September 7, 2005<sup>33</sup> (and its interpretative Regulation) establishes that all public or private entities that own or are in charge of a personal information database of Puerto Rico residents must notify such citizens and the P.R. Bureau of Consumer Affairs of any security violations. The term “*personal information database*” is defined as any file in which the information may be read without need of a special cryptographic key, that contains at least the first name or initial and last name of a person, combined with any of the following:

- social security number,
- driver’s license number, voting identification or other official identification,
- bank or financial account numbers, with or without their assigned passwords
- usernames and passwords for private or information systems,
- medical information protected by HIPPA,
- tax information, and
- employee evaluations.

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<sup>32</sup> 3 L.P.R.A. § 926f.

<sup>33</sup> 10 L.P.R.A. §§ 4051 *et seq.*

Addresses or information available in public documents and accessible to the public are not considered protected information.

Employers who keep databases of their employees of the sort previously described are covered by Law No. 111.

The term “*security violation*” is any unauthorized access to a personal information database, in a way such that compromises the security, confidentiality and integrity of the information. It also includes where there is a reasonable suspicion that someone authorized to access the information has violated its confidentiality or obtained the authorization under false pretenses to use the information illegally.

Covered entities must expeditiously notify affected residents of a security breach, taking into consideration the need of public order entities to protect a potential crime scene and the implementation of measures to restore system security. This may be done by mail or by an electronic means that complies with Puerto Rico’s Digital Signatures Law. The law has different notification requirements where providing this notice or identifying the affected persons may entail an undue burden or exceed \$100,000 or 100,000 affected persons. In these cases the notice may be in the form of a press release in a newspaper of general daily circulation. It must also be published in the entity’s facilities, web page and internal informative publications sent via regular or electronic mail. Where a particular professional or commercial sector is affected, a notice must also be published in the publication or program of greatest circulation in that sector.

They must also notify the Bureau of Consumer Affairs within ten (10) days from detecting the violation. The Bureau in turn will make a public announcement within twenty four (24) hours if the entity has been unable to identify affected clients and has therefore been unable to notify affected persons.

The notice must be clearly and conspicuously describe the violation in general terms and the sort of information involved. It must include a toll free number or web address for affected persons to obtain more information or assistance.

As per the applicable regulations,<sup>34</sup> the notice must contain, to the extent possible, the following information: nature of the situation, number of residents potentially affected, if criminal complaints have been filed, measures that have been taken, and an estimate of the time and cost required to fix the situation. Failure to comply with the notification requirements of this Law may result in the imposition of a fine, ranging from \$500 to \$5000, per each violation.

### Drug Testing

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<sup>34</sup> Puerto Rico Department of Consumer Affairs Regulation 7376, adopted June 25, 2007.

There is no requirement to have a drug testing program in Puerto Rico. Nevertheless, should a private employer voluntarily adopt such a program, it must abide by the requirements of Law No. 59 of August 8, 1997.<sup>35</sup> Compliance with all of the applicable requirements of Law No. 59 may afford a more limited exposure to potential claims from employees regarding acts or omissions of the employer or its agents while conducting drug tests on its personnel.

According to Law No. 59, any drug-testing program in Puerto Rico must be delivered in writing to all covered employees at least sixty (60) days before it will become effective. The program must meet specific content requirements which include a plan to educate employees on the risks associated with the inappropriate use of controlled substances, a description of treatment and rehabilitation programs, the rules of conduct regarding use of controlled substances and positive drug tests along with a description of the corresponding sanctions, a description of the drug testing procedures and a notice of who is subject to said testing.

All drug testing and sample collection must comply with the Mandatory Guidelines for Federal Workplace Drug Testing Programs issued by the U.S. Department of Health and Human Resources. Further, all samples must be collected in a manner that ensures the employees' privacy rights guaranteed under the Puerto Rico Constitution. Employees must be informed in writing that they are entitled to engage another lab to analyze their test results. A third lab may be engaged if the first result is positive and the second is negative. The third result is binding.

Drug test results are confidential and any related documentation must be kept separate from the personnel file. The information may only be revealed to the employee or its authorized representative, employees designated by the employer, and rehabilitation treatment providers when the employee is in such a program.

Significantly, Law No. 59 specifies that a first positive drug test result will not constitute just cause for dismissal under Puerto Rico's Wrongful Discharge Statute, Law No. 80, *supra*. Accordingly, a first positive drug test result will not excuse the employer from the monetary indemnification provisions established in Law No. 80 for cases of dismissal without just cause. This does not mean that the employer may not take disciplinary action as may be warranted by the law and its policies to address performance issues, even if they relate to the drug use. The advisability of such discipline should be analyzed on an individual basis.

The employer, however, may require the employee who has had a positive drug test result, to enter a drug rehabilitation program and to submit to periodic additional drug tests as part of the rehabilitation program. If the employee refuses to participate in a rehabilitation program or if the results of subsequent tests are also positive, the employer may impose disciplinary measures in accordance with its rules of conduct. Employees may also be disciplined if they fail to comply with all of the program requirements.

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<sup>35</sup> 29 L.P.R.A. §§ 161 *et seq.*

Significantly, an employee's unjustified refusal to submit to a drug test raises a presumption that the result would have been positive and allows the employer to take disciplinary measures in accordance with its rules of conduct.

An employee's absence from work to attend a rehabilitation program may be deducted from the employee's accrued sick leave and vacation leave, in that order. If both leaves have been exhausted, the employee is then entitled to up to thirty (30) days of unpaid leave for rehabilitation purposes.

Law No. 59 permits drug testing in six (6) sets of circumstances: (1) pre-employment screening as part of a general physical examination required of job candidates,<sup>36</sup> (2) mandatory testing, which would include employees who control or drive a motor vehicle which is used to transport passengers or cargo by land, air or sea; (3) testing as part of or after the employee has completed a drug rehabilitation programs, (4) post-accident testing, (5) testing based on reasonable suspicion as defined by law, and (6) random testing.

Except where a drug test has rendered a duly verified positive result, or where the testing is part of a rehabilitation or treatment program, employees may not be submitted to more than two (2) drug tests per year.

Law No. 59 allows an employee to sue an employer who negligently relies on an incorrect test result or who harms his or her reputation by negligently revealing the result of a drug test.

### Maternity Benefits

Law No. 3 of March 13, 1942, as amended, (the "Working Mother's Act")<sup>37</sup> provides an eight (8) week maternity leave for female employees, at full pay. The leave commences four (4) weeks before birth and extends until four (4) weeks after birth.

As an alternative, the employee can work up to one (1) week before the expected date of birth if she brings a medical certificate to the effect that she is able to do so. The leave may be extended for medical complications that disable an employee for work, up to twelve (12) weeks after the original leave expires. This extended leave is without pay, except that the employee may qualify for non-occupational disability benefits under Puerto Rico's Short Term Non-Occupational Disability Statute ("SINOT") (See discussion below).

If the employee gives birth prior to the expected date of birth, she may extend her postnatal leave by the amount of time that she did not enjoy of pre-natal leave. If she gives birth after the expected date of birth, pre-natal leave is similarly extended until actual birth, and paid

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<sup>36</sup> Pursuant to the applicable provisions of the Americans with Disabilities Act, such a general physical examination may be made only after a conditional offer of employment, but before hiring actually occurs provided that said general physical examination is required of all employees.

<sup>37</sup> 29 L.P.R.A. §§ 467 *et seq.*

accordingly.<sup>38</sup> The employee may return to work after the first two (2) weeks of post-natal rest, as long as she brings a medical certificate that she is able to do so.

Paid maternity leave is also available for female employees who suffer an abortion that produces the same symptoms as a live birth. It is also available to the female employee who adopts a child of five (5) years of age or younger, and complies with other legal requirements.

The employer must pay eligible employees the total leave compensation to which they are entitled when they commence their maternity leave (instead of regular payroll payments).

Female employees cannot be discharged because of pregnancy or because of reductions in the quality or quantity of work due to pregnancy. Further, their working conditions cannot be changed because of pregnancy. In addition, pregnant employees may not be terminated except for just cause. This means that the employer would be liable for violating the Working Mother's Act, even if did not terminate the employee because of her pregnancy, if it terminated her without just cause. The employer may raise as a defense lack of knowledge of the pregnancy.

Violations of the Working Mothers Act are punishable by fines of \$100.00 - \$1,000.00, or a jail term of thirty (30) to ninety (90) days. The employee can also file a civil claim for twice the amount of damages caused, plus reinstatement.

The Department of Labor and Puerto Rico courts are particularly responsive to violations of this law. Additionally, Title VII of the Civil Rights Act of 1964 (Title VII), provides for an independent cause of action for discrimination or discharge based on an employee's pregnancy condition.

#### Break for mothers who breast-feed

Puerto Rico Law No. 427 of December 16, 2000, as amended by Law No. 239 of November 6, 2006,<sup>39</sup> grants a break from work to allow the mother who breast-feeds time to lactate her baby or to express milk. Generally, that law provides the following:

- All employers are required to allow a breastfeeding mother to breastfeed her infant (if the employer has a child-care center on premises) or to express (extract) milk for such purposes. The break is of one (1) hour for each full day of work (at least seven and a half (7½) hours).<sup>40</sup>

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<sup>38</sup> The law does not say if the post-natal leave should be reduced accordingly, so that total leave does not exceed eight (8) weeks).

<sup>39</sup> 29 L.P.R.A. §§ 478 *et seq.*

<sup>40</sup> Small employers need only grant thirty (30) minutes, that may be divided in two (2) breaks of fifteen (15) minutes each.

- This break may be divided into two (2) breaks of thirty (30) minutes or three breaks of twenty (20) minutes each.
- The right subsists for twelve (12) months from the time that the employee returns to work after her maternity break.
- To be entitled to this break, the employee must request it and bring a medical certificate during the fourth and eighth months of life of her infant, which indicates that she has been breastfeeding her baby. The employer and the employee must then agree upon a break schedule which must not be changed without the express consent of both parties.
- Every employer who grants this break will be entitled to an exemption from annual income tax equal to one month of the employee's salary.
- The court may impose a fine for the damages suffered by an employee who has been denied this break. The fine may equal three (3) times the salary of the affected employee for each day in which the right to breastfeed or express milk was denied.

Implied in Article 3 of this law is the employer's obligation to have an area prepared for the mother to express milk. This obligation appears to arise where the employer does not have a child care facility on premises.

On March 23, 2010 President Barack Obama signed the Patient Protection and Affordable Care Act. Under that law, employers covered by the Fair Labor Standards Act are now required to furnish "reasonable" breaks to working mothers each time they need to express milk for their infant. The law covers mothers with children up to one (1) year of age who are not FLSA exempt. That is, the law does not cover professional, executive or administrative employees, among other FLSA exempt categories. The law also requires employers to provide to covered employees with a private space to express milk. A bathroom facility does not qualify as a private place under the new law. Employers with less than fifty (50) employees may claim an exemption from the law if compliance would cause them an undue hardship in terms of significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. This break is unpaid.

Note, however, that Puerto Rico employees covered by both the federal and the local law, will be able to claim the greater benefits of either statute in their circumstances.

### Equal Pay

The federal Equal Pay Act of 1963 applies in Puerto Rico. It requires that men and women performing equal work receive equal pay. However, the "equal pay" provisions apply only to employees who: (1) are engaged in equal work or jobs; (2) perform work which requires equal skills, efforts, and responsibility; and (3) perform under similar working conditions. All of these tests must be met in order for the equal pay standards to apply.

### Discrimination



Law No. 100 of June 30, 1959,<sup>41</sup> as amended, prohibits employment discrimination on the same protected categories as Title VII and ADEA (race, color, sex, national origin, religion, age). The Puerto Rico statute also prohibits discrimination based on other categories. For instance, employees are protected from discrimination on the grounds of their social condition and political ideals. Perhaps the most significant difference with its federal counterpart, is that it creates a rebuttable presumption of discrimination if the employer lacked just cause for the adverse action in question. If the employee proves lack of just cause, the employer has to prove lack of discriminatory intent. This is the exact opposite of the standard under federal law, where the employee always has the ultimate burden of proven illegal intent.

An additional statute, Law No. 69 of July 6, 1985,<sup>42</sup> specifically deals with sex discrimination and complements Law No. 100. The substance of Law No. 69 closely follows the law as it has developed under Title VII and Law No. 100. Unlike Law No. 100, it has its own anti-retaliation provision.

Law No. 100 also prohibits discrimination on the grounds of being married to another company employee, except where there is a clear conflict of duties that substantially and adversely affects its operations. Employers with fifty (50) or more employees have to make a reasonable accommodation in such circumstances.

As amended by Law No. 271 of December 17, 2006, Law No. 100 also protects persons who are victims of domestic violence, sexual aggression or stalking, or who are perceived to be victims of such crimes. This amendment imposes on the employer an affirmative duty to make reasonable necessary workplace adjustments to protect employees from a potential aggressor, which duty arises once the employer is advised that a dangerous situation can potentially occur. (The law does not explain when is notice of a dangerous situation deemed to be sufficient and there are yet no court decisions on the matter.) Failure to meet this duty is presumed to be a discriminatory act in violation of the law.

When considering its options in complying with the safety duties of this amendment, employers should be aware that they have standing to file for protective orders under the Law to Prevent Domestic Violence.<sup>43</sup> They should also bear in mind that a separate law adopted earlier (Law No. 217 of September 29, 2006)<sup>44</sup> imposes upon them a duty to adopt a protocol to address situations of domestic violence. The protocol is discussed further below.

Similarly, local Law No. 232 of September 13, 2012 amended Law No. 100 to include military status as a protected category, including being in the military, formerly serving in the military, serving or having served in the Armed Forces of the United States or holding a veteran status. This law adds to Law No. 100 certain definitions relevant to its implementation.

Finally, as amended by Law No. 22 of May 29, 2013, Law No. 100 now includes among its

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<sup>41</sup> 29 L.P.R.A. §§ 146 *et seq.*

<sup>42</sup> 29 L.P.R.A. §§ 1321 *et seq.*

<sup>43</sup> Law No. 54 of August 15, 1989, 8 L.P.R.A. § 623.

<sup>44</sup> 8 L.P.R.A. § 601.

protected categories those of sexual orientation and gender identity.

Employers must maintain appropriate records of hiring practices or policies, training programs, promotions and "other employment practices" for a minimum of two (2) years.<sup>45</sup> These records include lists of applicants, the order in which applications were received, a description of selection criteria, tests, interviews, evaluations and personnel files. The personnel files in turn must contain applications and documents related to recruitment, promotion, demotions, transfers, discipline, suspension, termination, payment conditions and other terms of compensation, as well as documents related to selection for participation in training programs. Applications may not include direct or indirect references that identify or classify applicants or employees because of their age, race, color, sex, religion, national origin, political affiliation, social origin or condition, national origin, marriage or disability. Otherwise, the application or any similar inquiries will be considered prima facie evidence of discriminatory practices. Finally, the Regulations include posting requirements.

The penalties under the different anti-discrimination laws vary. Generally, economic and emotional damages are available as remedies as well as reinstatement and other injunctive relief. Damages are automatically doubled as a penalty without the employee having to prove actual malice or reckless disregard of his or her rights.

In addition to the prohibition against political discrimination found in Law No. 100, Law No. 47 of April 28, 1930<sup>46</sup> prohibits an employer from influencing the way an employee will vote by means of intimidation or threat, termination, refusal to hire or salary reduction. Violations of this law entail monetary fines of up to \$5,000 or up to one (1) year imprisonment.

### Sexual Harassment

Puerto Rico's anti-sexual harassment statute, Law No. 17 of April 22, 1988,<sup>47</sup> imposes strict (automatic) liability upon employers for any type of sexual harassment by the employer's agents or supervisors. Strict liability is imposed regardless of whether (1) the conduct was specifically prohibited by the employer; (2) the employer was not aware of it; or (3) the employer did not have reason to know of any such conduct.<sup>48</sup>

Pursuant to Law No. 17, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and any verbal or physical conduct of a sexual nature, when it takes place under any of the following circumstances:

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<sup>45</sup> Regulation 6236, adopted by the Secretary of Labor on November 16, 2000.

<sup>46</sup> 29 L.P.R.A. §§ 131 *et seq.*

<sup>47</sup> 29 L.P.R.A. §§ 155 *et seq.*

<sup>48</sup> This standard of liability may be incompatible with the *Faragher* defense that has been recognized under federal law and which is based on a standard of vicarious rather than automatic liability. Under that defense, an employer may escape liability for sexual harassment by a supervisor under certain circumstances that include having procedures in place to prohibit, prevent and redress harassment and the employee unreasonably failing to use them.

- if acquiescence to sexual conduct is an express or implied condition of the victim's employment;
- if employment decisions are based on whether the employee submits to or rejects the harassment; or
- if the conduct unreasonably interferes with an employee's performance, or creates an intimidating, hostile or offensive work environment.
- The law covers harassment conducted by means of any sort of communication, including the use of multimedia tools through the world-wide web or by any electronic means.

Unlike Law No. 100, but like Law no. 69, this statute has its own anti retaliation provision.

Liability for violations of this law includes automatic double damages. When pecuniary damages cannot be determined, the statute imposes a mandatory penalty of three thousand dollars (\$3,000.00) plus costs, expenses and attorney's fees.

### Employees with Disabilities

Law No. 44 of July 2, 1985<sup>49</sup> prohibits employment discrimination against persons with disabilities, individuals regarded as having a disability<sup>50</sup> or those who have a history of a disability. It also protects those having a known relationship to someone with a disability.

Unlike the other local anti-discrimination laws, which apply to all employers, Law No. 44 applies only to employers with fifteen (15) or more employees. It covers persons with physical, mental or sensorial impairments. The definition of who is a covered person with an impairment under Law No. 44 is somewhat broader than under the ADA. Like ADA, Law No. 44 deems protected those who have an impairment that substantially limits the performance of one or more major life activities, as long as they can perform essential job duties<sup>51</sup> with or without a reasonable accommodation. Law No. 44, however, also protects those who suffer from an impairment that prevents or limits work or academic performance or the full enjoyment of life, who are otherwise qualified to perform essential job duties with or without a reasonable accommodation. Note that, under this second definition, the impairment does not have to be “substantial”. Morbid obesity is expressly deemed a covered disability under the local law.

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<sup>49</sup> 1 L.P.R.A. §§ 501 *et seq.*

<sup>50</sup> Under its federal counterpart, the federal Americans with Disabilities Act of 1990 (ADA), an individual is “regarded as” disabled if he or she has been subjected to an action prohibited under said Act because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity. Our local law does not define this term.

<sup>51</sup> Like the ADA, local law also grants deference to an employer’s written job description when it comes to determining essential job duties.

Like ADA, the local law addresses discrimination in employment, public services and in public accommodations operated by public or private entities. Even before the ADA Amendments Act of 2008<sup>52</sup>, our local statute had a more liberal interpretation in favor of extending its benefits to persons with disabilities.<sup>53</sup>

Law No. 44 prohibits employers from discriminating against covered persons with a disability because of their impairment, in their hiring, compensation, promotions, training and benefits practices, as well as in their reasonable accommodation and accessibility facilities and any other employment conditions. The employer may not require the disclosure of a disability in employment applications and doing so constitutes *prima facie* evidence of discrimination. The employer must provide a reasonable accommodation to permit disabled persons “to work effectively to their maximum productivity”, unless said reasonable accommodation would represent an economic<sup>54</sup> undue burden. A reasonable accommodation may include adjustments in the working area, construction of physical facilities, acquisition of specialized equipment, readers, assistants, drivers, and interpreters, when these do not constitute an economic undue burden.

Local law incorporates the remedies provided under Law No. 100, which are greater than those provided under the ADA. Further, Law No. 44 allows the employee to file a claim with the Solicitor for Persons with Disabilities (“Procurador de las Personas con Impedimentos”). This official may require the employers to submit specific plans to make their premises structurally accessible, and to comply with the reasonable accommodation request of the law. The Solicitor is empowered to investigate possible violations and impose administrative penalties of up to five thousand dollars (\$5,000.00) for each violation.

The local law further requires all public and private institutions, including employers, to reorganize and restructure their programs and facilities to make same accessible to individuals with disabilities, along the lines provided for by the “Americans with Disabilities Act Guidelines.” In particular, the law refers to the placement of *Braille* signs at building entrances.

Another local statute, Law No. 81 of July 27, 1996<sup>55</sup>, contains additional rights regarding disabled employees and job applicants. It covers applicants with a disability that substantially limits a major daily life activity and who can perform essential job duties with or without reasonable accommodation. They must also meet the job qualification criteria, including experience and academic, and must have passed any test required to qualify for the job. Those employees or applicants are entitled to an additional five (5) points or five percent (5%),

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<sup>52</sup> The EEOC Final Regulations of April 22, 2011 emphasize that the focus of the ADA no longer should be on whether an individual comes within the definition of “disabled,” but rather on whether discrimination has occurred.

<sup>53</sup> Article 14 of Law No. 44 expressly requires a broad interpretation in favor of protecting persons with disabilities and expressly prohibits use of restrictive federal case law developed under the ADA.

<sup>54</sup> The ADA’s definition of undue burden is broader and includes more non-economic factors, such as the number of employees, the impact on operations, the number, type and location of facilities, the composition, structure and functions of the workforce, among others. 42 U.S.C. § 12111(10).

<sup>55</sup> 29 L.P.R.A. §§ 1401 *et seq.*

whatever is greater, to the score of said test. The extra credit does not apply if the person qualifies for similar extra credit as a veteran.

Under this statute, the employment application must express that there is no need to reveal a disability in the application, but that the employee may do so in order to benefit from the protections of this law. This law also requires employers to provide reasonable accommodations to allow covered employees to work “effectively” and “maximize their productivity and promotion possibilities”. The law contains criminal penalties and injunctive remedies.

### Genetic Information Non Discrimination Act

Title II of the Genetic Information Non Discrimination Act of 2008 (GINA) prohibits employers from discriminating, harassing or retaliating against applicants and employees on the basis of genetic information. It also restricts acquisition and disclosure of genetic information by employers. GINA’s employment provisions cover employers with 15 employees or more. They entered into force as of November 21, 2009. The Puerto Rico legislature is currently considering enactment of an analogous local law. The bill is still pending consideration before that body.

### Retaliation

Law No. 115 of December 20, 1991<sup>56</sup> provides that testimony given by an employee in any judicial, legislative or administrative investigation related to the employer's business is not considered just cause for discharge. Further, no employer can dismiss, threaten or discriminate against an employee for offering or trying to offer such testimony or information.

Violation of these prohibitions will entitle the employee to reinstatement and to recover twice the mental anguish and economic damages proved in court. Defamatory testimony, or publication of privileged information, will remove this protection from the employee.

Note that the protections of this law are triggered only where the employee provides the information to a government agency. This law, therefore, does not cover internal discrimination or wage and hour complaints the employees may make directly with their private employers. Internal discrimination complaints may be covered by the anti-retaliation provisions of Title VII, or Puerto Rico Laws Nos. 17 and 69 discussed before. Internal wage and hour complaints may be covered by FLSA anti-retaliation provisions.

### Rights of Employees to Vote in Elections

Puerto Rico Law No. 78 of June 1, 2011,<sup>57</sup> requires employers who operate during an election day, to establish shifts that will allow its employees to vote. An employer must allow an

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<sup>56</sup> 29 L.P.R.A. § 194a.

<sup>57</sup> 16 L.P.R.A. § 4061(13).

employee to take off as much time as is necessary and reasonable for the employee to vote, considering among other factors, the distance between the workplace and the voting centers.

### Domestic Violence in the Workplace

As discussed above in the context of discrimination law in Puerto Rico, an employer may not discriminate against an actual or perceived victim of domestic violence or stalking. In addition, Puerto Rico Law No. 217 September 29, 2006 requires private employers to create, maintain and implement protocols to address domestic violence in the workplace. The protocol must at a minimum contain the following:

- A declaration of the public policy that serves as the basis for the protocol
- The legal grounds for the protocol
- The applicability of the protocol
- Designation of personnel responsible for each aspect of the protocol
- Procedures to implement the protocol
- Uniform measures for case management

Puerto Rico Law No. 54 of August 15, 1989, allows employers to request a protective order for the benefit of its employees, visitors or anyone else in its premises, if one of its employees has been a victim of domestic violence or other crime and the acts have occurred in the workplace. Before filing for this order, the employer must notify the employee of its intentions.<sup>58</sup> Law No. 54 covers same sex couples.

### Veterans and Employees on Military Service Leave

Under the Federal Uniformed Services Employment and Re-Employment Rights Act of 1994<sup>59</sup>, a person may not be discriminated against because of serving, having served or having applied to serve in the military. Further, employers are required to reinstate employees returning from military service, including the Reserve, National Guard and any training duty, within certain conditions.

Generally, a person whose job absence was necessitated by reason of service in the armed forces is entitled to reinstatement in the position said person would have held had she or he been continuously employed. Reinstatement entails seniority and other rights and benefits determined by seniority as well as those the employer may provide to those on leave of absence. The requirements are as follows:

- the person must have provided the employer advance verbal or written notice of the need for such military services;

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<sup>58</sup> Specifically 8 L.P.R.A. § 623.

<sup>59</sup> 38 U.S.C.A. §§ 4311 *et seq.*

- cumulative absences for reason of said services do not exceed five (5) years and;<sup>60</sup>
- the employee applies for reinstatement.

Numerous qualifications apply to each of these three (3) conditions for reinstatement, such as exceptions to the five (5) year cumulative absence limitation and to the duty to provide prior notice if circumstances make it unreasonable. Also, the application for reinstatement must be made within particular deadlines that differ according to the length of service.

For example, where the period of service was less than thirty-one (31) days, the employee must report to the employer no later than the first full regularly scheduled work period on the first full calendar day following completion of service and a period of eight (8) hours to allow for the employee's safe transportation from the training area to his home. Where the period of service exceeds thirty-one (31) days but not one hundred and eighty one (181) days, the veteran has fourteen (14) days to apply for reinstatement. Where meeting these deadlines is not possible, however, the employee can still request reinstatement as soon as practicable under the circumstances. Finally, where service exceeds one hundred and eighty one (181) days, the employee must apply for reinstatement within ninety (90) days of its completion.<sup>61</sup>

If the employee is hospitalized or convalescing from a service-related or service-aggravated illness or injury, he must report for work upon conclusion of said hospitalization or recovery period. That period is of two (2) years, but may be extended to meet circumstances beyond the person's control that make it impossible or unreasonable for him to report within that period.

Failure to meet the deadline to request reinstatement does not automatically extinguish reinstatement rights, as these will be determined by applicable employer policies and practices regarding absences from scheduled work.

On the other hand, reinstatement may be denied, even where the prior conditions are met, where circumstances have so changed with the employer that make reinstatement impossible or unreasonable, or where the employment in question was of brief duration and non-recurrent. Also, in certain circumstances reinstatement may be denied if it causes undue hardship. Where, because of a service-related or service-aggravated disability, a returning veteran is no longer qualified to be reinstated in the position he or she would have held had he or she been continuously employed, the person is still entitled to reinstatement in an equivalent position in terms of seniority, status and pay or in a position of nearest approximation.

Once reemployed, veterans may not be discharged from their position without cause for up to one (1) year after restoration of employment, in cases of service of one hundred and eighty one (181) days or more. This protection extends only to one hundred and eighty (180) days from

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<sup>60</sup> As we will see, there is no such limitation under the Bill of Rights of the Puerto Rican Veteran of the Twenty First Century. An employee covered by both statutes will be entitled to the greater benefit of either law.

<sup>61</sup> As we will see, these periods are shorter than those that exists under local law to request reinstatement. See previous footnote.

reinstatement, if service lasted more than thirty (30) but less than one hundred and eighty one (181) days.<sup>62</sup>

Specific requirements also exist under the federal statute regarding how to handle benefits and health plans during the leave, and regarding the status of benefits upon reinstatement. USERRA has its own anti retaliation provision.

Little known Law No. 26 of March 18, 2010<sup>63</sup> establishes that any regular private or public employee, not in probation or temporary employment contract, whose net income from active service in the armed forces, is less than his or her income for civil employment, is entitled to be paid the differential.

Further rights exist under local Law No. 203 of December 14, 2007<sup>64</sup>, known as the Bill of Rights of the Puerto Rican Veteran of the Twenty-First Century. For example, employers must:

- preferentially hire and promote veterans over candidates with the same academic, technical or experience qualifications;<sup>65</sup>
- reinstate in the same, an equivalent or similar position, an employee returning from services in the armed forces, if he so requests within one hundred and eighty (180) days from honorable discharge; if no such positions exist, the employer must do every effort to re-train the employee to hold available positions; reinstatement must be with the same rights and privileges as if the employee had been in continuous employment, including seniority accrual; reinstatement rights will continue throughout the duration of active service regardless of length of such service;
- if a veteran has obtained the minimal score required to pass a test required for job entry or promotion, the employer must add ten (10) points or 10% to his or her score, whichever is greater;<sup>66</sup>
- offer qualification exams to any returning veteran who might have missed such exams and who requests them within 180 days from reinstatement, and to include the veteran's name on the corresponding registry if he or she passes the exam;
- send to the Office of the Solicitor for Veteran's Rights job notices of available positions.

Employees covered by both the federal and the local statute will be entitled to the greater benefit of either law.

### Jury Duty Leave

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<sup>62</sup> Remedies for termination without just cause in this case would exceed those for wrongful termination under local Law No. 80, described before. They would include lost wages and benefits, plus an equal amount as liquidated damages in cases of willful violations, reinstatement, costs and attorneys' fees.

<sup>63</sup> 3 L.P.R.A. § 714a.

<sup>64</sup> 29 L.P.R.A. §§ 735 *et seq.*

<sup>65</sup> Similar rights exist under Law No. 218, of August 28, 2003, as amended. 3 L.P.R.A. § 714d.

<sup>66</sup> As mentioned when discussing disability discrimination, an employee is not entitled to this bonus in addition to the bonus granted to employees with a disability under Law No. 81 of July 27, 1996.



There are several laws that protect the employment of jurors in Puerto Rico.

Law No. 87 of June 26, 1964,<sup>67</sup> entitles employees who are called to serve as jurors in either a local or federal Puerto Rico court, to reinstatement in the job held at the time of leave or one of equal category, status and compensation. The employee has forty eight (48) hours to request reinstatement and the employer must immediately comply. Employees are entitled to charge their absence against accrued vacation. An employer who terminates an employee because of having served as a juror or who refuses reinstatement is liable for automatic double damages.

Articles 7 and 11 of Law No. 281 of September 27, 2003,<sup>68</sup> grant employees on active jury duty the following rights:

- Paid leave for the first fifteen (15) days;
- After fifteen (15) days, right to charge absence against accrued vacation;
- Protection against discrimination or termination on account of jury duty;
- Reinstatement in the same position;
- Protection against the leave being deducted from their salary, vacation or sick-leave except as allowed by this law.

The employee must inform the employer of his upcoming absence for jury duty at least five (5) working days in advance (unless there is just cause for a delay). The employee must present a certificate of appearance to be entitled to reinstatement.

Employers who discriminate against an employee because of having been summoned to serve, is serving or has served as a juror, or who refuse to reinstate an employee returning from jury duty, are liable for twice the damages caused to the employee in a sum of no less than \$3,000 (or \$1,000 if damages cannot be determined). The law also provides for reinstatement.<sup>69</sup>

Article 299 of Law No. 149 of June 18, 2004<sup>70</sup>, makes it a misdemeanor to discriminate against any employee on the grounds that he or she has been called to serve, is serving or has served, as a juror. It requires employers to reinstate such employees as long as they request reinstatement within forty-eight (48) hours from being released from service.

The federal Protection of Juror's Employment Statute,<sup>71</sup> prohibits an employer from discharging, intimidating or coercing a permanent employee on account of having been called to serve as a juror. Upon returning from jury duty, employees are entitled to treatment as if they had been on furlough or leave, with ensuing benefits and no loss of seniority. This law does

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<sup>67</sup> 29 L.P.R.A. § 152.

<sup>68</sup> 34 L.P.R.A. §§ 1735e and 1735i.

<sup>69</sup> 34 L.P.R.A. § 1735k.

<sup>70</sup> This is part of Puerto Rico's Penal Code, 33 L.P.R.A. § 4927.

<sup>71</sup> 28 U.S.C.A: § 1875.

not provide for paid leave. Liability for violations of this law include lost wages and benefits and injunctive relief, as well as a civil penalty of up to \$5,000 per employee.

### Witness Leave

Article 299 of Law No. 149 of June 18, 2004<sup>72</sup>, makes it a misdemeanor to discriminate against any employee on the grounds that he or she has been required to appear as a witness before any court of law, the Puerto Rico legislature or any of its commissions, or a municipal assembly or any of its commissions. It requires employers to reinstate such employees as long as they request reinstatement within forty-eight (48) hours from being released from service.

Law No. 122 of July 12, 1986,<sup>73</sup> prohibits employers from deducting from a worker's salary, vacations or sick-leave, time spent as a witness in a criminal case, when the employee's court testimony has been duly required by a prosecuting attorney or by the court. To be entitled to this protection the employee must notify the employer two (2) days in advance of the need to be absent and must give the employer the certificate of appearance to be issued by the court or prosecutor. Employers violating this law may suffer penalties of twice the amount deducted from the employee's salary.

### Sports Leave

Law No. 49 of June 27, 1987,<sup>74</sup> creates a special sports leave for employees duly certified as athletes representing Puerto Rico in Olympic, Pan American, Central American, regional or other international sports events. Employees will accrue up to thirty (30) days of sports leave per year.

At least ten (10) days in advance of the time the athlete is required to report, the employee must provide the employer with a certified copy of the document that credits his or her athlete status along with the dates during which the employee's participation will be required on a covered event. If the leave exceeds thirty (30) days the employee will be allowed to use any accrued vacation, for a maximum consecutive leave of forty-five (45) days per year. Except for the period in which the employee uses accrued paid leave, this special sports leave is unpaid. Violations of this law entitled the employee to double damages and reinstatement.

For purposes of this leave, the term "athlete" includes judges, referees, sports technicians, health professionals, delegates and any other person so certified by the Puerto Rico Olympic Committee or by the Secretary of Sports and Recreation.

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<sup>72</sup> This is part of Puerto Rico's Penal Code, 33 L.P.R.A. § 4927.

<sup>73</sup> 29 L.P.R.A. §§ 193 *et seq.*

<sup>74</sup> 15 L.P.R.A. §§ 1101 *et seq.*

Law Num. 24 of January 5, 2002,<sup>75</sup> also creates a leave of absence for athletes in training and trainers certified as such by the Board for the Development of the Full-Time Puerto Rican Athlete. The definition of a covered employee is very broad, including traditional employment contracts and any others hired to provide service in exchange of a fee. This unpaid leave will not exceed one (1) year unless thirty (30) days advance notice of renewal is provided to the employer, prior Board approval.

At least fifteen (15) days in advance of the date the athlete is required to report, the employee must provide the employer a certified copy of the document that credits his or her athlete status along with the dates during which the employee's participation will be required.

During the special sports leave and the sports leave of absence employees will not lose accrued seniority or accrued benefits.

Violations of this law make the employer liable for double damages and reinstatement discharge.

Athletes certified for competition in international sports events for the disabled are also protected by these laws.

### Leave to Renew Driver's License

Employers must provide two (2) hours of paid leave to employees who need to renew their valid driver's license, as required by Puerto Rico laws and Department of Transportation Regulations. See Puerto Rico Law No. 132 of June 3, 2004.<sup>76</sup>

### Family Leave

The federal Family and Medical Leave Act of 1993 (FMLA), applies in Puerto Rico and has no local law counterpart. It covers employers who employ fifty (50) or more employees<sup>77</sup>, grants certain employees up to twelve (12) weeks of job protected unpaid leave each year in order to care for their newborn child, or for the placement of a child with the employee for adoption or foster care. An employee's right to leave for the birth or adoption of a child ends twelve (12) months after the child's birth or placement with the employee. This leave is also

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<sup>75</sup> 15 L.P.R.A. §§ 1107 *et seq.*

<sup>76</sup> 9 L.P.R.A. § 5052.

<sup>77</sup> While ordinarily the legal entity will be considered the employer, if two (2) or more entities are so closely integrated that they should be considered a single employer, the employees of both will be included in the computation.

available to care for a seriously ill spouse, child or parent, or because of the employee's own serious health condition.<sup>78</sup>

In 2008, the FMLA was amended to create leave for military caregivers as well as leave for certain qualifying exigencies that may arise from the fact that a covered relative is in, or has been called to, active duty. These leaves are discussed further below.

To be eligible for FMLA leave, the employee must have worked for the employer at least twelve (12) months, for at least 1,250 hours during the year preceding the start of the leave, and be employed at a work site where the employer employs at least fifty (50) employees within a seventy-five (75) mile radius. Special rules apply to determine if flight attendants or flight crew members are eligible.

Generally, employees returning from leave have the right to return to the position held when leave began, or may be placed in an equivalent position with equivalent pay and benefits. They also retain their accrued benefits. However, employees are not entitled to accrue seniority or employment benefits during leave. While employees are on leave, the employer must maintain their coverage under any "group health plan".

The statute contains certain limitations when both spouses work for the same employer; allows for leave to be used intermittently as well as on a reduced schedule, as agreed with the employer; permits employers to deny reinstatement to certain "key" employees (those with salaries in the upper 10% of employees of the employer within seventy-five miles of the facility) under certain extreme circumstances; provides prerequisites for the entitlement to the leave and creates several notice and medical certification obligations as to both the employee and the employer.

The benefits provided under this law are in addition to any other benefits required by local law or authorized pursuant to company policy. The employer may require leave under this law to run concurrently with other types of leave, including paid leave, if it observes certain requirements.

As per amendments to the FMLA implemented by Section 585 of the National Defense Authorization Act of Fiscal Year 2008 ("NDAA 2008") and the National Defense Authorization Act for Fiscal Year 2010 (the "NDAA 2010"), the FMLA provides two special forms of military family leave, one for military caregivers and the other for "qualifying exigencies" of an active call for duty.

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<sup>78</sup> Though the FMLA speaks of leave in relation to a "parent" or to a "son or daughter", it defines that term to include not only a legal parent-child relationship but a relationship with one who stood in *loco parentis*. On June 22, 2010, the DOL's Wage and Hour Division Administrator issued Interpretation No. 2010-3 regarding the term *loco parentis*. It describes the term to refer to a "person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption". Someone who provides day to day care and financial support to a child, for instance, can be considered to stand in the place of a parent (*loco parentis*) to that child. That FMLA Final Regulations effective March 9, 2013, incorporate this concept. See 29 C.F.R. § 825.102, § 825.122(c), (d), (h), (j).

Under military caregiver leave, a spouse, son, daughter, parent, or next of kin (closest blood relative) may take up to twenty six (26) workweeks of leave to care for a covered service-member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness sustained or aggravated in the line of duty on active duty. This military caregiver leave is available during “a single 12-month period” during which an eligible employee is entitled to a combined total of 26 weeks of all types of FMLA leave.

A covered service-member includes veterans honorably discharged during the five year period preceding leave (excluding the period since October 29, 2009 when NDAA 2010 was enacted and the effective date of the 2013 FMLA Final Regulations).

Qualifying exigency leave may be taken to take care of the following matters that may arise out of the fact that the spouse, son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to active duty): cases of short notice deployment (seven days or less), attending military events and support activities related to the active duty call, making necessary childcare arrangements,<sup>79</sup> providing necessary urgent childcare or making any necessary school transfer changes, making financial and legal arrangements related to the absence, attending counseling necessitated as a result to the call to active duty, spending time with a covered military member who is on short term rest and recuperation (up to fifteen days of continued leave in this case) and participating in certain post deployment activities (including arrival ceremonies and funeral arrangements), taking care of a military member parent incapable of self-care, including arranging for alternate care.

### Workers’ Accident Benefits Program and Protected Leave

Law No. 45 of April 18, 1935,<sup>80</sup> establishes a health and benefit program for workers who suffer work-related accidents or illnesses. The program provides full medical care, short term disability benefits, permanent disability benefits, and benefits to dependents in case of death. It covers all employers. The State Insurance Fund Corporation (“SIF”) is the public corporation that runs the program.

Employers must obtain the government insurance with the SIF, which cannot be substituted by private or self-insurance. Coverage for all employees is compulsory.

To enroll, employers must file with the SIF an Application for Workmen's Compensation Policy, together with payment of the corresponding premium. All employers must pay premiums at rates that are actuarially determined by the SIF according to the risk of the particular activity performed by the employees. The rate of premium assessed is paid entirely

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<sup>79</sup> In cases of qualified exigency leave, is not necessary that the child in relation to who the employee seeks leave, be the employee’s legal son or daughter.

<sup>80</sup> 11 L.P.R.A. §§ 1 *et seq.*

by the employer, without any employee contributions, on the basis of each \$100.00 of payroll in each risk category.

For regular, permanent policies, the policy year starts on July 1st and ends on June 30. The employer has the option of paying the yearly premium in two (2) installments, one (1) corresponding to each semester of the policy year.

The SIF must receive the payment for the first (1<sup>st</sup>) semester at the time the employer opens the policy, and thereafter within the deadline indicated by the SIF upon receipt of the employer's Payroll Statement, which must be filed on or before July 20<sup>th</sup>. Similarly, the SIF must receive the payment for the second (2<sup>nd</sup>) semester of the policy year before January 20<sup>th</sup>. (The SIF may not send the employer a separate invoice but this will not excuse non-payment.) Late payments will result in the employer being found uninsured with respect to any accidents occurring during that semester prior to the date when the SIF receives the premium payment. Mere deposit in the mail might not be enough to procure coverage.<sup>81</sup>

As mentioned before, on or before July 20th of subsequent policy years, the employer must file with the SIF a Payroll Statement containing its actual payroll for the previous policy year. This payroll statement will serve two (2) purposes. First, it will serve as the estimated payroll for the next policy year. Accordingly, the SIF will use it to estimate the premium for that next policy year. Second, the SIF will use it to determine the actual premium the employer should have paid for the prior policy year. The SIF will then make an adjustment in its next invoice to reflect any under or over-payments for the prior year's policy. This adjustment is known as the final liquidation of a policy year.

There is another type of policy, known as an eventual or temporary policy. These cover activities that will last for a specified period of time. For eventual policies, the employer must pay the premium upon opening the policy. The policy is effective from the date in which the SIF receives the payment and is not retroactive to the date of commencement of operations. The SIF will determine the amount to be paid for the policy based upon the total value of services that the employer will render under the contract and the particular risk classification into which the employees fall. Initially, the SIF will estimate the payroll as a percentage of that total value. At the end of the period for which the employer opened the policy, the employer will then have to file a final payroll statement with its actual payroll for that project. The SIF will then determine whether the employer underpaid or overpaid premiums and charge or credit the employer accordingly.

Checks in payment of the premiums should be drawn in favor of the Corporation of the State Insurance Fund and preferably paid personally for a formal receipt and immediate insured status. They can also be mailed, with the risk that they may not be received on time and then the employer would be subject to the same consequences of a late compliance.<sup>82</sup>

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<sup>81</sup> The law allows the postmark date on the certified mail to count as receipt date if the date can be read. Because of the significant consequences of non-compliance, however, I always recommend personal delivery.

<sup>82</sup> See previous footnote.

Significantly, the law affords insured employers immunity from tort claims a worker may file for damages suffered in the course of employment on account of negligence on the part of the employer or its agents. Article 20 of Law No. 45 provides that, when a work-related accident is covered by the SIF, the worker cannot sue his employer or the "statutory employer" (i.e., the person for whom the actual employer provides services as a contractor). Nevertheless, Article 3(b) imposes a penalty upon the employer, for accidents attributable to a deficiency duly notified by the Accident Prevention Bureau. The penalty equals the compensation, which the worker would receive from the Fund.

Employers are required to reserve the worker's employment for twelve months (360 days) from the date on which the disability commenced. They are also required to reinstate the worker in his prior position if (1) the worker requests reinstatement within fifteen (15) days after being released from treatment, (2) the worker is both physically and mentally able to perform the usual duties of his employment, and (3) the position is still open at the time of the request for reinstatement, as that term ("open") is defined by law. Failure to reinstate will afford a cause of action for damages to the injured worker, including back pay and reinstatement.

#### Short Term Non-Occupational Disability Benefits Program and Protected Leave

Law No. 139 of June 26, 1968,<sup>83</sup> creates a short term disability benefits program for non-work-related accidents or illnesses. The program is administered by the Department of Labor. Benefits include weekly stipends as well as compensation for death and dismemberment.

Employers having one or more employees must comply with SINOT. One way to do so is to pay a tax of 1% on the first \$9,000 earned yearly by each employee. The employer contributes 0.5% of this tax, the employee the remaining 0.5%. The employer must withhold from the employee's wages the corresponding contribution and remit it to the Department of Labor in the form of quarterly returns.

Employers wishing to enroll in SINOT must file an application. The Department of Labor will assign the employer an identification number and send it the forms it will need to file quarterly with the full amount of the tax.

Instead of paying the tax, employers may obtain private non-occupational disability insurance. In that case, the private plan must receive prior approval from the Secretary of Labor and must contain benefits equal to, or better than, the benefits provided by the government plan. Private plans must also pay a fee to the government for administrative expenses. Plans are submitted for approval annually, prior to April 30. If approved, the private plan may be implemented the following July 1st.

Under SINOT, the employers are required to reserve the worker's employment for a period of one (1) year (365 days) counted from the date on which the disability commenced, and to reinstate the worker in his prior position if he meets requirements similar as those described

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<sup>83</sup> 9 L.P.R.A. §§ 201 *et seq.*

above for reinstatement under Law No. 45. Remedies for failure to comply with this duty are also analogous.<sup>84</sup>

### Chauffeurs Disability Benefits Program and Protected Leave

Law No. 428 of May 15, 1950,<sup>85</sup> establishes the Social Security Fund for Chauffeurs and Other Employees, which provide short and long term disability benefits as well as death benefits. Any non-exempt employee who drives regularly (at least once a week, independent of the amount of time) and as part of his duties on company business, is covered by the law, whether driving his own or a company car.

Under this plan the employer must notify the Bureau of Benefits to Chauffeurs and other Persons with Non-Occupational Disabilities immediately upon hiring a covered employee. For every partial or entire week of work that each covered employee works for the employer, the employer must pay a tax of \$0.30 (thirty cents). The employer must also withhold fifty cents (\$0.50) from the employee's salary, for each whole or partial week of work. Failure to comply with these provisions entitles the employee or his beneficiaries to recover from the employer a sum equal to twice the benefit he would have received otherwise.

Every quarter, the employer must remit the amounts withheld, together with its part of the tax and certain information regarding its employees, to the Fund for the Social Security of Chauffeurs and other Persons. This payment is due within sixty (60) days after the end of each quarter.

Employees covered by the Chauffeurs Social Security Fund do not have to be covered by SINOT. However, as a practical matter, employers sometimes provide drivers with coverage under both the Social Security Fund for Chauffeurs and SINOT. While the expenses involved are not great, non-compliance may result in material liabilities to employers.

Under the Chauffeurs Insurance Act of Puerto Rico, the employers are required to reserve the worker's employment for a period of one (1) year (365 days) counted from the date on which the disability commenced; and to reinstate the worker in his prior position if he requests reinstatement within the job reservation period and within thirty (30) days after being released from treatment, the worker is both physically and mentally able to perform the usual duties of his employment, and the position is still open at the time of the request for reinstatement. Remedies available for violations of this reinstatement requirement include back-pay, compensation for all damages suffered by the employee, plus reinstatement.<sup>86</sup>

### Automobile Accident Disability Leave

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<sup>84</sup> 11 L.P.R.A. § 203(q).

<sup>85</sup> 29 L.P.R.A. §§ 681 *et seq.*

<sup>86</sup> 29 L.P.R.A. § 693a.



The Puerto Rico Automobile Accident Social Protection Act, Law No. 138 of June 26, 1968,<sup>87</sup> establishes an automobile accident disability leave. Employers are required to reserve the position of employees disabled as a result of automobile accidents for up to six (6) months, regardless if the accident was work related. The employee must petition reinstatement within fifteen (15) days after discharge from treatment. The Company's refusal to reinstate employees upon timely request might render it liable for reinstatement, back wages and damages, if the employee's position remains open as defined by law.<sup>88</sup>

### Unemployment and F.I.C.A. Taxes

Law No. 74 of June 21, 1956,<sup>89</sup> known as the Employment Security Act, establishes the Puerto Rico Unemployment Insurance System, which mandates participation by all employers in Puerto Rico. The rate of contribution depends on the funds available in the Unemployment Fund and the employer's experience rating. The latter is determined on the basis of a formula that considers the employer's contributions less any paid benefits, divided by the average taxable salaries paid during the last three years. The contribution rates range from 1% to 5.4% of salaries up to \$7,000. There is also a special contribution of up to 1% over the taxable wages.

As per amendments made in the year 2005, the experience rating is transferred to successor employers who retain substantially the same property or management or control over it, or who employ some or all of the former employer's employees. If the Department of Labor finds that the transfer was made with the intent of obtaining a lower unemployment tax rate, the agency will assign it the highest rate for a period sufficient to determine its experience rating.

Under Federal law, the employer must pay an unemployment tax according to a rate of 6.0% on the first seven thousand dollars (\$7,000.00) of wages paid to each employee or a maximum tax of four hundred thirty-four dollars (\$420.00) per employee. This is the rate in force as of as of July 1, 2011. Federal law entitles the employer to take a credit of up to 5.4% against the federal unemployment tax for the tax paid under the Puerto Rico Employment Security Act. An additional credit may be available if the employer's experience rating under local law is lower than 5.4%.

Federal F.I.C.A. (Social Security) taxes must also be withheld by employers on the taxable wages of each employee and the employer must also pay its own contribution equal to that of the employee. The contribution rate per employees is 7.65%. The rate is broken down as follows:

- 6.2% (social security portion) on earning up to the maximum taxable amount (\$113,700 since 2013)
- 1.45% (Medicare portion on all earnings).

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<sup>87</sup> 9 L.P.R.A. §§ 2051 *et seq.*

<sup>88</sup> 9 L.P.R.A. § 2054(b).

<sup>89</sup> 29 L.P.R.A. §§ 701 *et seq.*

## Year End Bonuses

Year End bonuses are mandated by Law No. 148 of June 30, 1969. According to this law, each employer must pay a year-end bonus to each of its employees who has worked for the employer seven hundred (700) hours or more within the twelve (12) month period between October 1 of any given year and September 30 of the following year. The bonus must be paid between December 1 and December 15 of each year. This bonus is not tied to performance and is required for any employee that complies with the hours worked requirement.

For employers with more than fifteen employees, the bonus is equal to 6% of salaries up to \$10,000 (maximum bonus of \$600). For employers with fifteen employees or less the bonus is equal to 3% of salaries up to \$10,000 (maximum bonus of \$300).

The total amount of the bonus payment to all employees does not have to exceed 15% of the net earnings attributable to Puerto Rico operations. The bonus payment is not required if there are no net earnings for the period on which the bonus is based. In either case, however, a written notification to that effect, accompanied by supporting documentation, must be submitted to the Puerto Rico Secretary of Labor no later than November 30 of that year.

## Labor Relations

For employers engaged in interstate commerce in Puerto Rico, labor relations are governed by the federal Labor Management Relations Act (LMRA). The LMRA is administered by the National Labor Relations Board (NLRB), which exercises jurisdiction over establishments engaged in interstate commerce exceeding varying minimum annual amounts. The LMRA establishes certain basic rights for employees covered by the statute, such as the right to self-organization, to join existing labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities.

Employers may also be affected by Law No. 130 of May 8, 1945,<sup>90</sup> the Puerto Rico Labor Relations Act. For example, in order to promote collective bargaining, Section 9(c) of the Puerto Rico Labor Relations Act provides that the Puerto Rico Labor Relations Board may, in the exercise of its discretion, aid in the enforcement of arbitration awards.<sup>91</sup>

## Safety and Health in the Workplace

Both federal and Puerto Rico laws and regulations governing health and safety in the workplace apply to your business. The federal Occupational Safety and Health Act of 1970 (OSHA), as amended, has had extensive regulations issued under it by the U.S. Department of Labor. Its equivalent in Puerto Rico is the Puerto Rico Occupational Safety and Health Act, Law No. 16 of August 5, 1975.<sup>92</sup>

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<sup>90</sup> 29 L.P.R.A. §§ 61 *et seq.*

<sup>91</sup> 29 L.P.R.A. § 70(c).

<sup>92</sup> 29 L.P.R.A. §§ 361 *et seq.*

Both of these acts impose an affirmative obligation upon employers to provide a work environment free from known risks, which may cause death or physical harm to employees. Employers are required to provide and ensure the use of protective personal equipment as required or as reasonably necessary and to report serious accidents within eight (8) hours.

Puerto Rico regulations complement the federal regulations. There are severe criminal and civil penalties under both.

### Continuation of Health Benefits

The federal Consolidated Omnibus Budget Reconciliation Act (COBRA)<sup>93</sup> applies in Puerto Rico and has no local law counterpart. Under COBRA, coverage under group health plans, which would have been terminated, may be continued for a qualified beneficiary upon any one of the following events:

- the death of the covered employee;
- the termination (other than by reason of the covered employee's gross misconduct) or reduction of hours of the covered employee's employment;
- the employee's spouse divorce or legal separation from the covered employee;
- the covered employee becoming entitled to benefits under Medicare; or
- a dependent child ceasing to be a dependant under the generally applicable requirements of the plan, or in any of the above stated events.

In the event the beneficiary requests extended coverage, he or she must assume responsibility for payment of the premiums and the employer may charge 2% for coverage of administrative costs.

This federal law applies to employers with twenty (20) or more employees during the preceding calendar year. While normally each legal entity is considered separately, if related businesses are closely integrated, the employees in all such business may be taken into consideration for the computations. The law requires employers to inform all employees and their spouses of their right to continued coverage under the employer's plan, both upon plan enrollment and upon the occurrence of a qualifying event.

The federal 1996 Health Insurance Portability and Accountability Act ("HIPAA") modified and clarified certain COBRA rules. For example, a rule extends coverage to twenty-nine (29) months for beneficiaries declared disabled by the social security administration within the first sixty (60) days of continuation coverage. HIPAA clarifies that said extension covers all qualified beneficiaries in the family group. HIPAA also includes as qualified beneficiaries, children who are born or adopted during the coverage continuation.

### Protection of Trade Secrets

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<sup>93</sup> 29 U.S.C.A. §§ 1161 *et seq.*

Law No. 80 of June 3, 2011,<sup>94</sup> also known as the “Law for the Protection of Commercial or Industrial Secrets”, was enacted to protect employers that own commercial secrets from improper acquisitions at the hands of ex – employees or competitors for their own gain. It defines “commercial secret” as “any confidential information that has commercial or industrial value and that its’ owner reasonably protects to avoid its’ disclosure”. It is distinguished from patents because commercial secrets do not usually need to be registered or require a formality to be protected.

Article 3 of the law classifies a commercial secret any information “from which can be derived an independent economic value (actual or potential value), or an economic advantage, because the information is not common knowledge” and it “has been the subject of reasonable security measures”. The law also considers as a commercial secret any information generated, used or derived from the effort to create a trade secret, even if the effort fails.

As we have mentioned, one of the requirements for information to be considered confidential or a commercial secret is that “it has been the subject of reasonable security measures”. Article 4 of the law lists certain measures which may be considered “reasonable”: avoid disclosure of information to entities or individuals not authorized to have access to it; limit the number of authorized personnel that have access to the information; require that authorized employees sign confidentiality agreements; store the information in a separate space from any other information; label the information as “confidential”; take measures to prevent indiscriminate reproduction of the information; establish control measures for the access and use of the information; or implement technologically available measures to publish or transmit information through Internet or any equivalent medium.

The law creates a cause of action for the owner of the commercial secret against any person who has improperly acquired the information. The law defines “improper acquisition” as the “acquisition of a commercial secret of another by a person who knew or should have known that the person acquired it by improper means” or “the disclosure or use of a commercial secret, without authorization, by a person who:

- used improper methods to discover the secret, or
- at the moment of the disclosure or use, knew or should’ve known that the secret was:
  - obtained through a person who acquired the information using improper means;
  - obtained through a person under circumstances that created a duty of maintaining its confidentiality or of limiting its use;
  - obtained through a person who had an obligation with the owner of the secret to maintain its’ confidentiality or limit its use;
  - or discovered the information by accident or error”.

The law creates a special procedure by which the Court may grant injunctive relief. The Court may grant material damages and additional damages caused by the improper advantage acquired by the defendant (if these damages were not already included in the material damages). If

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<sup>94</sup> 10 L.P.R.A. §§ 4131 *et seq.*

damages are not proven, the Court may order the payment of royalties during the period of prohibition of use or disclosure. The Court may award up to 3 times the quantity of damages that were proven.

Any legal action resulting from a violation of this law can be brought within 3 years from the date in which the owner knew or should have known about the circumstances that led to the legal action.

### Incentives for the Creation of Jobs

Law No. 1 of February 10, 2013, also known as “Ley de Empleos Ahora”, purports to create 50,000 new jobs in Puerto Rico within 18 months of its approval. It grants preferential treatment to small and medium businesses with certain local investment thresholds. The law creates an expedited procedure for eligible businesses to obtain general construction permits and general use permits. These permits consolidate into one, several other required permits. There are also expedited procedures for the approval of financing by the Economic Development Bank.

Employers that create jobs under this legislation will be awarded credits on energy consumption costs according to the date when the job is created. An eligible business must subscribe a Special Agreement for the creation of jobs. Some of the additional incentives available for eligible businesses under these agreements are the following: property tax exemption, partial salary refund, rental of properties from the “Compañía de Fomento Industrial de Puerto Rico”, special deduction on rental expenses, and salary subsidies, among others.

New business may obtain additional benefits such as a lower tax rate, extended deduction on account of net operational losses, two year exemptions from municipal patents and from movable property taxes, incremental implementation of the statutory year-end bonus required to be paid to employees, discounts on worker compensation premiums, among other. Developing business have yet other incentives available. Any of these incentives may be revoked if the business does not comply with its obligations.

Other incentives are available under other programs.

### Plant Closings and Mass Layoffs

The federal Worker Adjustment and Retraining Notification Act (WARN) applies in Puerto Rico and has no local law counterpart. It requires employers with 100 or more employees to provide sixty (60) days advance notice of a plant closing or a mass layoff. Employees who have worked less than six months in the last 12 months or those who work an average of less than 20 hours a week need not be counted towards the 100 employee threshold. All employees regardless of exempt status are entitled to this notice as well as the employees' representatives, the local chief elected official and the state's dislocated worker unit.