

Labour & Employment

Contributing editors

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Puerto Rico

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Legislation and agencies

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

Puerto Rico is a jurisdiction with a highly regulated labour and employment arena, generally protective of employee rights. As an unincorporated territory of the United States, US federal laws apply in Puerto Rico, including federal labour and employment laws.

The Puerto Rico Constitution, multiple labour and employment statutory and regulatory provisions and court decisions also govern the employment relationship. The main statutes include Law 80 of 30 May 1976 (Unjust Dismissal Act), various anti-discrimination and anti-retaliation provisions, expansive wage and hour laws and regulations, multiple statutory leaves of absence, a workers' accident compensation statutory scheme and many others.

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

Yes, there are federal and local laws in Puerto Rico prohibiting discrimination and harassment in employment. For federally protected categories, see US chapter for further information.

Local anti-discrimination laws include Law 100 of 30 June 1959 (General Anti-Discrimination Act) (as amended in 2013 by Law 22 and Law 107), Law 44 of 2 July 1985 (Disability Discrimination Act), Law 69 of 6 July 1985 (Sex Discrimination Act), Law 17 of 22 April 1958 (Sexual Harassment in Employment Act) and Law 3 of 13 March 1942 (Working Mother's Protection Act – Maternity Leave Law). Protected categories under local law include age; race; colour; sex; sexual orientation; gender identity; social or national origin; social condition; political affiliation; political or religious beliefs; being or being perceived as a victim of domestic violence, stalking or sexual aggression; veteran status; physical or mental disability; and pregnancy, maternity and adoption. Law 130 of 8 May 1945 (Puerto Rico Labour Relations Act) prohibits discrimination based on certain labour-related activities.

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

Aside from federal agencies such as the Equal Employment Opportunity Commission (EEOC) and the US Department of Labor, Puerto Rico has local agencies responsible for the enforcement of employment statutes and regulations, the primary ones being the Puerto Rico Department of Labor and Human Resources and its various divisions (eg, Bureau of Work Norms, Anti-Discrimination Unit) and the local workers' compensation agency (Puerto Rico State Insurance Fund Corporation).

Worker representation

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

As in the United States, the National Labor Relations Act (NLRA) applies in Puerto Rico to covered employers engaged in interstate commerce. The NLRA provides covered employees the right to self-organisation or to join or assist labour unions, to bargain collectively through union

representatives of their own choosing, and to engage in other concerted activities for collective bargaining or other mutual aid or protection. See also US chapter for further information.

The Puerto Rico Constitution (article II, sections 17–18) provides that employees of private employers, or of agencies or instrumentalities of the government operating as private employers, have the right to organise and to bargain collectively with their employers through representatives of their choosing and to engage in legal concerted activities. Puerto Rico Law 130 (Puerto Rico Labor Relations Act) and Law 45 (Public Service Labor Relations Act) also provide rules for union recognition comparable to the NLRA.

Background information on applicants

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

Private employers in Puerto Rico can perform background checks (including criminal and credit checks) on job applicants subject to federal parameters, including the Fair Credit Reporting Act (FCRA) and recent EEOC guidance concerning the potential disparate impact of background checks. See US chapter for further information.

Puerto Rico courts attach great importance to the constitutional provisions protecting human dignity and privacy from invasion by both public and private parties. These provisions include article II, sections 1 ('The dignity of the human being is inviolable') and 8 ('Every person has the right to the protection of law against abusive attacks on his honour, reputation and private or family life') of the Puerto Rico Constitution. Therefore, compliance with FCRA notice and certification provisions, and other privacy and confidentiality requirements, is of particular importance.

Further, the Puerto Rico Supreme Court found in *Rosario Diaz v Toyota de Puerto Rico, Corp*, 2005 TSPR 154 (2005), that discrimination on the basis of a prior criminal conviction is prohibited under Puerto Rico law and falls under the category of 'social condition', which is protected under Puerto Rico Law 100 (the local general anti-discrimination statute). The Puerto Rico Supreme Court set out seven factors that employers should consider in connection with an applicant who has criminal convictions:

- nature and magnitude of the crime committed;
- relationship between the crime committed, the position being applied for and the requirements and responsibilities of that position;
- the degree of rehabilitation of the applicant and any other information that the applicant or a third party can legitimately provide about that issue;
- the circumstances under which the crime was committed, including particular circumstances that were present at the time of the commission of the crime;
- the applicant's age at the time the crime was committed;
- the time period between the conviction and application for employment; and
- the legitimate interest of the employer in protecting its property, security and well-being, as well as that of third parties and the public in general.

An employer can make an adverse decision against an applicant because of a previous conviction only when, after careful consideration of these factors and under a standard of reasonableness, the employer determines that the previous conviction makes the employee unfit for the position.

The aforementioned considerations apply irrespective of whether the employer conducts its own checks or hires a third party to do so.

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

Subject to limited exceptions, requiring job applicants' or employees' genetic, medical and disability-related information is not permissible. See US chapter for further information.

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

Puerto Rico Law 59 of 1997 (Act to Regulate Controlled Substances Detection Testing in the Private Work Sector) permits (but does not require) private employers to establish a testing programme for the detection of controlled substances to promote the health and welfare of its employees through random selection methods. Under this law, controlled substances are defined as those substances included in the Controlled Substances Act of Puerto Rico or any other legislation of the Commonwealth of Puerto Rico or the United States of America (eg, cocaine, heroin), but specifically excludes controlled substances used by medical prescription or any other legal use.

Employers may require employees, candidates for employment and candidates for re-hire to submit to a controlled substances detection test as a condition of employment or continued employment under the following circumstances, among others:

- when an accident occurs in the workplace, attributable to the employee, in connection with his or her functions and during working hours;
- when there is reasonable individualised suspicion that the employee is using controlled substances. The test shall be made within the term of 24 hours; and
- as a pre-condition for recruitment and as part of a general physical-medical examination required of all candidates for employment.

Prior to implementing a drug testing programme, the employer must provide written notice of the programme to employees 60 days in advance of the implementation of the programme (and to candidates upon submitting an employment application). The notice must include very specific information about the programme (eg, effective date and the specific law that authorises its adoption). The drug testing must be carried out in accordance with the programme adopted by the employer, through regulations which shall also be provided to all employees and candidates for employment. The regulations to be implemented as part of the drug testing programme must include:

- A statement including a description of the sanctions and penalties that apply to the production, distribution, possession or illegal use of controlled substances under Puerto Rico and federal law.
- A statement specifying that the possession, distribution, use, consumption and illegal trafficking of controlled substances is conduct forbidden in the company.
- A plan developed by the employer to educate and inform the employees of the health risks associated with the illegal use of controlled substances.
- The adoption and description of programmes for assistance, treatment or orientation on the rehabilitation available to the employees.
- The company's rules of conduct on the use of controlled substances by its employees and a description of the sanctions to be imposed on the employees if such rules of conduct are violated or if the test is positive for the use of a controlled substance.

An employee's first positive drug test result shall not constitute just cause for dismissal without first requiring and allowing the employee to attend an appropriate rehabilitation programme.

The employer may require an employee with a positive test result to periodically submit to additional tests as part of the rehabilitation programme.

If the employee expressly refuses to participate in the rehabilitation programme, or if the result of the additional test is positive, the employer may impose corresponding disciplinary actions, pursuant to the regulations implemented by the employer. In imposing the disciplinary measures, the employer shall do so taking into account the relationship between the employee's conduct and his or her duties, its effect on the proper and normal function of the enterprise, and the risk to the safety of other employees and the public in general.

Before the employer can take any disciplinary action based on the positive result of a test, the result must be verified through a confirming laboratory test. The employee or candidate for employment shall have the opportunity to notify the laboratory of any information which is relevant to the interpretation of the result, including the use of prescribed or over-the-counter drugs.

The unjustified refusal of an employee to submit to a required drug test shall constitute prima facie evidence that the result would have been positive, and shall result in the application of disciplinary measures. Employees engaged in certain activities, such as driving railroad trains, transporting passengers in a motor vehicle, handling drugs or controlled or dangerous substances, and providing security guard services, are required to submit to mandatory testing.

Other circumstances include:

- A warning that the employees or candidates for employment shall be subject to drug tests.
- A detailed description of the procedures to be followed to conduct the tests (which must be urine tests, except in very limited circumstances), including the mechanism for the resolution of disputes over the results of the tests.
- A provision to the effect that the result of the tests shall be deemed to be and kept as confidential information. A positive drug test result cannot be used as evidence in a criminal suit against the employee, unless it is used by the employee in his or her defence.

The employer has to cover the expenses associated with the drug tests. Further, employees must be compensated for any time spent submitting to the tests.

Tests must be confidential and administered by a certified laboratory according to scientifically accepted analytical and chain of custody procedures, and under the Mandatory Guidelines for Federal Workplace Drug Testing Program. Every sample with a positive result shall be submitted for a second corroborative analysis. The employee shall be advised in writing that he or she is entitled to contract another laboratory to obtain a second result from the same sample, should he or she wish to do so, and the employer (or its testing agent) will be required to provide the minimum amount required of the sample to the employee's independent laboratory. If the employer's test is positive, and the employee's own laboratory's test is negative, then the employer may suggest three laboratories from which the employee is to choose one to conduct a third final and binding test at the employer's expense.

An employee may have a cause of action against an employer if: (i) the employer took disciplinary action or refused to hire the employee based on an erroneous test result and the employer relied on the erroneous test result through fraud, fault or negligence; or (ii) the employer damages the reputation of the employee by revealing the test results through fraud, fault or negligence. In addition, in lieu of filing suit, an employee who suffers damages as a result of a drug test performed on his or her sample may seek benefits under Puerto Rico's workers' compensation statute. However, with respect to applicants for employment, where a drug test is a pre-condition for recruitment required from all candidates, refusal to submit to a test may constitute unjustified refusal subject to the consequences of the employer's drug testing programme.

Hiring of employees

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

As noted above (see question 2), employers are prohibited from discriminating against applicants or employees on the basis of sex; age; race; colour; marriage; political affiliation; political or religious ideas; national origin; social origin; social condition; disability; pregnancy; genetic information; being or being perceived as a victim of domestic violence, stalking or sexual aggression; sexual orientation or gender identity; veteran status; and other categories protected by law.

Further, Law 80 of 30 May 1976 (Unjust Dismissal Act) requires that seniority preference be given to employees who were laid off owing to business necessity in the event that the employer needs to employ a worker in the same or similar occupational classification to that held by the employee at the time of discharge within six months following the layoff, except in those cases in which there is a clear and conclusive difference in favour of the efficiency or capacity of the workers compared, in which case the capacity shall prevail.

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

No. In general, employment contracts do not have to be in writing. Certain specific, employment-related provisions – such as agreements with non-exempt employees to reduce the statutory meal period, temporary and probationary employment agreements, agreements to pay a Christmas bonus at a date other than December 1-15, and non-competition agreements – require a valid written agreement, some with specific terms required for enforceability.

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

Temporary employment contracts for fixed periods are permissible in Puerto Rico and, if valid, are an exception to the ‘just cause’ requirement under Puerto Rico Law 80 (Unjust Dismissal Act) (except in the case of pregnant temporary employees, for whom ‘just cause’ must be shown). To be valid:

- the contract must be in writing;
- the contract must be for a fixed term or a fixed project, or for replacing a regular employee during a temporary absence;
- the purpose of the temporary contract and the duration of the employment period must be expressly stated in the written contract; and
- the contract must be signed during the employee’s first workday or, in the case of employees hired through a temporary employment services company, within the first 10 days of work. There are no specific limitations as to the maximum duration of temporary contracts but, by their very nature, they must be ‘temporary’ and reasonably limited in duration. If the employee continues working after the end of the temporary period, he or she will become a regular employee.

11 What is the maximum probationary period permitted by law?

Probationary periods are permissible in Puerto Rico and, if valid, are an exception to the ‘just cause’ requirement under Puerto Rico Law 80 (Unjust Dismissal Act). For the probationary period to be valid:

- the probationary contract must be in writing;
- the probationary contract must be signed prior to engaging in any type of work;
- the probationary period included in the written contract must be for a fixed period not to exceed the first 90 calendar days of employment (which can be extended up to 180 days with Secretary of Labour approval); and
- the contract must establish the specific date on which the probationary period commences and the precise date on which it ends. The probationary period may not be extended at the discretion of the employer. If the employee continues working after the end of the probationary period, he or she will become a regular employee.

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

To determine whether a person is an employee or an independent contractor, several factors must be taken into account, including: the nature, scope and degree of control exerted by the principal; the degree of economic dependency of the individual on the principal; the form of compensation; income tax withholding; the individual’s authority to hire and discharge employees, and assign work; and opportunity for profit and loss.

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

Law 26 of 22 July 1992 regulates the provision of temporary employees to client companies by temporary service companies. As a general rule under Law 26, both the temporary service company and the client company are considered joint employers. However, Law 26 delineates certain responsibilities of the temporary service company and those of the client company.

Temporary employees are entitled to vacation and sick leave accruals provided by the temporary service companies under applicable law or mandatory decrees. However, with respect to other mandates established by decree, the temporary employees will be subject to the benefits established by the decrees applicable to the client companies.

For acts constituting unlawful job discrimination, sexual harassment or unjustified dismissal, whichever discriminates against or dismisses the temporary employee or takes actions sanctioned by law, be it the temporary service company or the client company, will be responsible.

Regarding an employer’s obligation to retain a temporary employee’s position during the effective term of the contract when the employee takes a leave of absence, the temporary service company is responsible for retaining the employee’s position. But if the temporary service company does not comply, the client company where the employee was rendering services at the time he or she took the leave will be held responsible.

The temporary service company bears the responsibility for payment of the temporary employee’s Christmas bonus, unless the employee has worked for the client company for more than 700 hours as required by law. In any case where the temporary service company does not comply with its obligation, the client company will be responsible instead.

Further, pursuant to Law 26, temporary employees may not be contracted for the following purposes:

- as a method or mechanism for destroying or keeping labour unions out of the workplace;
- to perform any act of discrimination prohibited by law;
- as a means of evading compliance with Puerto Rico Law 80 (Unjust Dismissal Act); and
- as a means of breaking, weakening or interrupting strikes or work stoppages.

Additionally, as noted above (see question 10), for a temporary contract to be valid under Law 80:

- the contract must be in writing;
- the contract must be for a fixed term or a fixed project, or for replacing a regular employee during a temporary absence;
- the purpose of the temporary contract and the duration of the employment period must be expressly stated in the written contract; and
- the contract must be signed during the employee’s first workday or, in the case of employees hired through a temporary employment services company, within the first 10 days of work.

Foreign workers

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

Puerto Rico is subject to US federal immigration laws governing foreign workers. See US chapter for further information.

15 Are spouses of authorised workers entitled to work?

Puerto Rico is subject to US federal immigration laws governing foreign workers. See US chapter for further information.

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

Puerto Rico is subject to US federal immigration laws governing foreign workers. See US chapter for further information.

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

Puerto Rico is subject to US federal immigration laws governing foreign workers. See US chapter for further information.

Terms of employment

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

The Federal Department of Transportation’s limitations on hours of work for covered drivers apply in Puerto Rico. See US chapter for further information.

Non-exempt employees who work in excess of 40 hours per week and/or eight hours in any 24 consecutive hour period are entitled to overtime. Employees may not opt out of these statutory limitations.

Law 379 of 15 May 1948 (Puerto Rico Working Hours and Days Act) establishes generally that non-exempt employees must be allowed a fixed meal period of no less than one hour during regular and overtime working hours (a shorter period of at least 30 minutes may be allowed by written agreement, provided it benefits the employee). The meal period generally must start between the conclusion of the third consecutive hour of work and the beginning of the sixth, so that employees are not required to work

for more than five consecutive hours without a meal period. The meal period may be taken between the second and third consecutive hour of work, provided the employee and the Puerto Rico Department of Labor and Human Resources authorises this exception. Non-exempt employees are also entitled to a second meal period after five consecutive hours of work after the previous meal period. Minors are entitled to a second meal period after four consecutive hours of work. The second meal period may be waived by the employee in writing if it is for the mutual benefit of the employee and the employee only works two hours or less of daily overtime hours.

Law 1 of 1 December 1981 (Puerto Rico Closing Law) also regulates the work schedule of covered employees in Puerto Rico. The Closing Law applies to any type of business operation (with 25 employees or more) of commercial activity for the sale or transfer of retail articles, or a combination of wholesale and retail sales, subject to certain exceptions. Covered establishments must be closed from 5am to 11am on Sundays and all day on New Year's Day, Epiphany, Good Friday, Easter Sunday, Mother's Day, Father's Day, General Elections Day, Thanksgiving Day and Christmas Day. During these periods, no work may be performed, except that related to the continuity of operations and maintenance. Special premium-pay provisions apply for work on Sundays by non-exempt employees covered by the Closing Law. Employees may not opt out of these statutory protections.

Further, non-exempt employees covered by Law 289 of 1946 who work six consecutive days have the right to take a day of rest. The day of rest is a calendar period of 24 consecutive hours during a calendar week. Any hours worked during the day of rest must be paid at double the rate agreed upon for the regular hours. Employees may not opt out of these statutory protections.

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

Regulation No. 13 of the Puerto Rico Minimum Wage Board defines the administrative, executive and professional exemptions to overtime requirements, mirroring the current regulations under the Fair Labor Standards Act (FLSA). See US chapter for further information. Regulation No. 13 also recognises the outside sales exemption and that certain computer professions may qualify for the professional exemption.

Overtime pay is required for non-exempt employees who work in excess of 40 hours per week and/or eight hours in any 24 consecutive hours. As a general rule, Law 379 of 15 May 1948 requires the payment of overtime at a rate equal to two times the employee's regular rate. In *Vega v Yiji Motors*, 146 DPR 373 (1998), the Puerto Rico Supreme Court stated in dicta that, in the case of employers covered by the FLSA, the employer has an obligation to pay overtime at a rate not less than time-and-a-half the employee's regular rate of pay, including for hours worked in excess of eight hours during any 24 consecutive hours and/or in excess of 40 hours per week. Still, even in industries covered by the FLSA, if a collective bargaining agreement or Mandatory Decree of the Minimum Wage Board requires the payment of overtime at double the regular rate, then overtime must be paid at double the regular rate.

20 Can employees contractually waive the right to overtime pay?

No, employees cannot contractually waive the right to overtime pay.

However, Law 83 of 20 July 1995, which amended the Working Hours and Days Act, permits a flexible work schedule (flexitime) through mutual agreement, whereby employees are permitted to adjust their start and end times, up to three hours earlier or later than the regular start or end time, without the employer incurring overtime charges for hours of work over eight per 24 consecutive hours. To implement a flexible work schedule, the following requirements must be met:

- the agreement must be voluntary;
- the employer must pay overtime for any hours in excess of the eight hour workday;
- the employee must work consecutive hours and cannot work split shifts (except for the meal break); and
- no work can be performed during a rest period of at least 12 consecutive hours between the end of one shift and the beginning of the next.

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

Yes, there is legislation establishing the right to vacation time in Puerto Rico. Under Puerto Rico Law 180 of 27 July 1998, all workers in Puerto Rico employed on or after 1 August 1995, except exempt administrators,

executives and professionals as defined by Regulation No. 13, accrue vacation at the rate of one and one-fourth days for each month in which the employee works at least 115 hours. The grandfather clause contained in Law 180 guarantees that those employees who, as of 1 August 1995, were covered by a Mandatory Decree that provided for a different monthly accumulation of vacation, or a vacation accrual based on fewer hours of work, will continue to enjoy their existing benefits.

There is no general law establishing the right to holidays in the private sector. However, as noted above (see question 18), establishments of industries covered by the Puerto Rico Closing Law must be closed on New Year's Day, Epiphany, Good Friday, Easter Sunday, Mother's Day, Father's Day, General Elections Day, Thanksgiving Day and Christmas Day.

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

Yes, there is legislation establishing the right to sick leave in Puerto Rico. Under Puerto Rico Law 180 of 27 July 1998, all workers in Puerto Rico employed on or after 1 August 1995, with the exception of administrators, executives and professionals, accrue sick leave at the rate of one day per month for each month in which the employee works at least 115 hours. The grandfather clause contained in Law 180 guarantees that those employees who, as of 1 August 1995, were covered by a mandatory decree that provided for a different accumulation or accrual of sick leave will continue to enjoy their existing benefits.

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

Federal leave laws (eg, Family and Medical Leave Act) apply in Puerto Rico. See US chapter for further information.

In addition, there are multiple types of leaves of absence or time off available in the private sector in Puerto Rico, including vacation, sick leave, Social Security for Chauffeurs Act, Puerto Rico Automobile Accident Compensation Administration (ACAA), Non-Occupational Disability Benefits Act, Fondo del Seguro del Estado (local workers' compensation), maternity or breast feeding, jury duty and several others (eg, special sports leave, criminal case witness and drivers' licence renewal).

Aside from vacation and sick leave under Puerto Rico Law 180, covered above (see questions 21-22), the main Puerto Rico leave laws include the following:

Puerto Rico Law 30 of 30 March 1942 (Puerto Rico Working Mothers Protection Act) grants pregnant employees the right to enjoy paid maternity leave of four weeks before childbirth and four weeks after childbirth independent from, and in addition to, any other type of leave to which the pregnant employee may be entitled under other laws. Maternity leave benefits must be paid in full at the time the employee commences her prenatal leave period. In computing maternity leave pay, the average salary received by the employee during the six months immediately preceding the commencement of leave is used as the basis for payment. Law 54 of 10 March 2000 amended the Puerto Rico Working Mothers Protection Act to extend maternity leave benefits to adoption.

Puerto Rico Law 428 of 15 May 1950 (Social Security for Chauffeurs Act) establishes a social security plan which provides sick, accident, death and other benefits to chauffeurs and other covered employees whose employers require or permit them to drive a motor vehicle in the performance of their work, as well as drivers who work for themselves in authorised public transportation. The Social Security for Chauffeurs Act leave requirements do not apply to executive, administrative or professional employees as defined by Regulation 13 of the Puerto Rico Minimum Wage Board. Besides payment of insurance, the law provides reservation of employment and reinstatement rights. The employer must reinstate the employee if:

- the employee requests reinstatement within 30 business days (almost one and a half months) from the date on which the worker is discharged from medical treatment, so long as the request is made within one year from the date of commencement of the disability;
 - at the time of the request, the employee is mentally and physically able to perform his or her duties; and
 - the employee's job has not been eliminated at the time of the request.
- The ACAA is a government-owned corporation of Puerto Rico (created by Puerto Rico Law 138) that provides compensation for medical and disability expenses resulting from traffic accidents in Puerto Rico. The coverage offered by the corporation is mandatory, but private insurance companies

are allowed to provide supplemental policies. Besides payment of medical or disability expenses, the law provides reservation of employment and reinstatement rights. The employer must reinstate the employee if:

- the employee requests reinstatement within 15 days from the date on which the worker is discharged from medical treatment, so long as the request is made within six months from the date of commencement of the disability;
- at the time of the request, the employee is mentally and physically able to perform his or her duties; and
- the employee's job has not been eliminated at the time of the request.

Puerto Rico Law 139 of 26 June 1968 (Non-Occupational (Short-Term) Disability Benefits Law, or SINOT) was specifically enacted for the benefit of employees who lose time away from work, and their wages, as a result of a non-occupational illness or accident – that is, this law does not cover wage loss from workers' compensation accidents or injuries, or from accidents or injuries arising from automobile accidents, since other Puerto Rico government laws and programmes apply to those. Employees pay 0.05 per cent of their wages (with the employer making a matching contribution), up to a maximum of US\$9,000 per year, to a government Disability Benefits Fund from which benefits are paid to covered employees suffering from a temporary disability. Besides payment of insurance benefits, the law provides disabled employees leaves of absence and reinstatement rights. Upon recovery from the non-occupational disability, the employer must reinstate the employee if (i) the employee requests reinstatement within 15 days from the date on which the worker is discharged from medical treatment, so long as the request is made within one year from the date of commencement of the disability; (ii) at the time of the request, the employee is mentally and physically able to perform his or her duties; and (iii) the employee's job has not been eliminated at the time of the request.

The Puerto Rico State Insurance Fund Corporation is the local workers' compensation agency. Besides payment of insurance benefits, including partial wage replacement payments, the law provides disabled employees leaves of absence and reinstatement rights. The employer must reinstate the employee if the employee requests reinstatement within 15 days from the date on which the worker is discharged from medical treatment, so long as the request is made within 12 months (not one year) from the date of commencement of the disability.

As noted above, there are multiple other local leave laws, each with different pay, duration and eligibility requirements.

24 What employee benefits are prescribed by law?

Under Puerto Rico Law 180, all workers in Puerto Rico employed on or after 1 August 1995, with the exception of administrators, executives and professionals, are entitled to statutory vacation and sick leave. See questions 21–22. For additional leaves required by law, see question 23.

Further, employers are mandated by law to provide workers' compensation and unemployment insurance coverage.

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

No. For temporary employment contracts, see questions 10 and 13.

Post-employment restrictive covenants

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

In *Arthur Young & Co v Vega III*, 136 DPR 157 (1994), the Puerto Rico Supreme Court stated that in order for a covenant not to compete to be enforceable, it must comply with the following general elements:

- it must be in writing and voluntary;
- the duration of the covenant should not exceed one year;
- adequate consideration is required:
 - for current employees, continued employment is not sufficient consideration – rather, the employee must receive additional consideration for agreeing to the new restrictive condition; and
 - for applicants, no additional consideration is required – employment is sufficient consideration;
- the restriction must be clearly necessary in order to protect a legitimate interest of the employer;
- the geographic area must be specified and limited to those areas needed to prevent true competition between the employer and the employee; and

- any client limitations must be specified and should be limited to those previously serviced by the employee.

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

In general, no.

Liability for acts of employees

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

A person is generally liable only for his or her own acts or omissions, except for instances of vicarious liability enumerated in the Puerto Rico Civil Code. Article 1803 of the Civil Code provides that owners or directors of an establishment or enterprise are liable for any damages caused by their employees in the course of employment. Courts consider the following three elements in deciding whether to impose liability under the doctrine of respondeat superior consistent with Puerto Rico law: (i) the employee's desire to serve, benefit or further his or her employer's business or interest; (ii) whether the act is reasonably related to the scope of the employment; and (iii) whether the agent has not been prompted by purely personal motives. Among these elements, 'the fundamental consideration for determination of an employer's liability is whether or not the employee's acts fall within the scope of his or her employment in the sense that they furthered a desire to serve and benefit the employer's interest, resulting in an economic benefit to the employer' *Vernet v Serrano-Torres*, 566 F.3d 254, 261 (1st Cir 2009).

Taxation of employees

29 What employment-related taxes are prescribed by law?

Employers in Puerto Rico are responsible for income tax withholding, Federal Insurance Contributions Act (Social Security and Medicare taxes), Federal Unemployment Tax Act, state unemployment, disability tax, chauffeurs' Social Security, and workers' compensation. Puerto Rico employees are required to pay federal income taxes on income from federal sources outside of Puerto Rico; otherwise they are exempt from federal income taxes. Puerto Rico imposes a separate income tax in lieu of federal income tax.

Employee-created IP

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

No, Puerto Rico does not have a local law addressing employee-created intellectual property. Rather, employee inventions are handled in accordance with the federal legal framework concerning 'works made for hire' under the US Copyright Act of 1976, 17 USC sections 101 et seq. See US chapter for further information.

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

The model Uniform Trade Secrets Act has been adopted by Puerto Rico as the Industrial and Trade Secret Protection Act of Puerto Rico (Law 80 of 3 June 2011). Under the statute, a person who misappropriates a commercial secret is liable for damages to the owner of the trade secret. Available relief includes money damages, injunctive relief and attorney fees.

Data protection

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

The right to privacy is recognised under the Constitution of the Commonwealth of Puerto Rico and extends to private employers. For example, under articles 1, 8 and 16 of the Constitution of the Commonwealth of Puerto Rico, employers must keep personnel files of employees confidential. As another example, fingerprints are protected by the Constitution Bill of Rights as being information the disclosure or unjustified retention of which may be a violation of the employee's privacy.

Additionally, federal and local laws recognise the confidential nature of certain information gathered by businesses (eg, medical information). Depending on the nature of the information, particular degrees of confidentiality and reasonableness are applied to the data.

Business transfers

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

As explained below (see question 34), Puerto Rico Law 80 of 30 May 1976 (Unjust Dismissal Act) requires that there be termination for 'just cause' (as defined by Law 80) or the payment of a statutory severance.

Law 80 further provides that, in the case of a transfer of an ongoing business, if the new acquirer continues to use the services of the employees who were working with the former owner, those employees shall be credited with the time they have worked in the business under former owners for seniority and other purposes. In the event that the new acquirer chooses not to continue with the services of all or any of the employees and hence does not become their employer, the former employer shall be liable for the statutory Law 80 severance (see question 34), and the purchaser shall retain the corresponding amount from the selling price stipulated with respect to the business. In case the new owner discharges the employees without just cause after the transfer, the new owner shall be liable for Law 80 benefits to the employee laid off, there also being established a lien on the business sold, to answer for the amount of the claim.

Termination of employment

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

Puerto Rico Law 80 (Unjust Dismissal Act) requires that there be termination for 'just cause' (or the payment of a statutory severance). The following reasons constitute just cause under Law 80:

- reasons based on employee's conduct:
 - the worker indulges in a pattern of improper or disorderly conduct,
 - the attitude of the employee of not performing his or her work in an efficient manner, or of doing it belatedly and negligently or in violation of the standards of quality of the product produced or handled by the establishment; and
 - the employee's repeated violations of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been opportunely furnished to the employee; and
- reasons based on business necessities:
 - full, temporary (less than six months) or partial closing of the operations of the establishment
 - technological or reorganisation changes as well as changes of style, design or the nature of the product made or handled by the establishment, and changes in the services rendered to the public; and
 - reductions in employment made necessary by a reduction in the anticipated or prevailing volume of production, sales or profits at the time of the discharge.

If the employer relies on business necessity just cause, it must retain employees of greater seniority on the job, provided there are positions vacant or filled by employees of less seniority on the job within their occupational classification which may be held by them, except in those cases in which there is a clear and conclusive difference in favour of the efficiency or capacity of the workers compared, in which case the capacity shall prevail. If employees are not regularly transferred from one office, branch, factory, or plant to another, and they operate in an independent manner in relation to personnel considerations, seniority is calculated by taking into account only the employees in the same occupational classification as the affected employees working in that office, branch, factory or plant. Law 80 also provides certain recall rights for six months following a group layoff if the same or similar work is needed during that time. See question 8.

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

The US Worker Adjustment and Retraining Notification (WARN) Act applies in Puerto Rico to mass layoffs requiring advance notice under certain circumstances. Under WARN, pay in lieu of notice may be provided in certain circumstances. See US chapter for further information.

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

As noted above, WARN applies in Puerto Rico, including its pay in lieu of notice provisions, which provide that an employer that violates the WARN Act notice requirement is liable to each affected employee for an amount equal to back pay and benefits for the period of violation up to 60 days. See US chapter for further information.

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

Yes, as noted above (see question 34) under Puerto Rico Law 80, full and part-time employees actually or constructively discharged without just cause are entitled to severance payments.

Severance calculation is based on years of service (YOS) and highest salary (including base pay and non-discretionary payments such as commissions, non-discretionary bonuses, etc) in the previous three years.

	Part A	Part B
0-5 years	2 months	1 week/YOS
5-15 years	3 months	2 week/YOS
15+ YOS	6 months	3 week/YOS

38 Are there any procedural requirements for dismissing an employee?

No, there are not. No prior government agency approval is required from termination.

39 In what circumstances are employees protected from dismissal?

Puerto Rico is not an 'at-will' jurisdiction. Instead, Puerto Rico Law 80 requires 'just cause' as defined by law (see question 34, supra) for the termination of employment or payment of the statutory severance if there is no 'just cause'. Further, various federal and local laws prohibit discriminatory or retaliatory terminations, or termination on the basis of whistle-blower or other protected activities. In addition, various local leave laws provide for the reservation of employment during covered leave periods. See question 24.

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

As noted above, WARN applies in Puerto Rico. See US section for further information.

Further, as noted above (see question 34), if the employer relies on a business necessity just cause as defined by Law 80, it must retain employees of greater seniority on the job, provided there are positions vacant or filled by employees of less seniority in the job within their occupational classification which may be held by them, except in those cases in which there is a clear and conclusive difference in favour of the efficiency or capacity of the workers compared, in which case the capacity shall prevail. If employees are not regularly transferred from one office, branch, factory, or plant to another, and they operate in an independent manner in relation to personnel considerations, seniority is calculated by taking into account only the employees in the same occupational classification as the affected employees working in that office, branch, factory or plant. Law 80 also provides certain recall rights for six months following a group layoff if the same or similar work is needed during that time. See question 8.

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

Class and collective actions are allowed in Puerto Rico.

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

No, there is no mandatory retirement age.

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

Yes, employers and employees may agree to the private arbitration of employment disputes.

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

In general, employees may release employment claims for valid consideration, unless otherwise prohibited by law. For information concerning valid releases of the US Age Discrimination in Employment Act and FLSA, see US chapter.

Puerto Rico Law 80 expressly prohibits waivers of its rights and declares void any agreement in which an employee waives Law 80 severance entitlements. The Supreme Court of Puerto Rico has determined that a settlement agreement with a Law 80 release is valid only if it provides for payment of the total severance amount required by Law 80. Various Puerto Rico courts and the Puerto Rico Department of Labor and Human Resources, however, have allowed settlement agreements that include Law 80 waivers for sums equal to (in the pre-claim context) and lower than (in the post-claim context) the payment required by Law 80.

Update and trends

On 29 September 2014, Puerto Rico Law 169 amended the Puerto Rico General Anti-Retaliation Act, Law 115, which prohibits retaliation against employees for giving or attempting to give testimony in any government forum. The amendment extended the protection to internal complaints made by employees. Under this amendment, any internal general complaint – not necessarily protected whistle-blower activities or reports directed to prevent discriminatory, retaliatory or harassment conduct – would also be considered protected under the law. The amendment only exempts from its protection internal complaints containing defamatory comments against the employer or disclosing privileged information. This amendment has created additional challenges for employers when analysing potential disciplinary actions against employees.

45 What are the limitation periods for bringing employment claims?

Different statutes of limitations govern the different local employment statutes. Claims for unjust termination under Law 80 are subject to a three-year statute of limitations. The statute of limitations for retaliation claims under Law 115 is three years. Other employment claims have different limitation periods.

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