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LEGISLATION AND AGENCIES

Primary and secondary legislation

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 have historically included Law No. 80 of 30 May 1976 (the Unjust Dismissal Act), various anti-discrimination and anti-retaliation provisions, expansive wage and hour laws and regulations, statutory leaves of absence, a workers' accident compensation statutory scheme and many others. Law No. 4 of 26 January 2017 (the Labor Transformation and Flexibility Act (Law No. 4)), ushered in sweeping changes and flexibility to Puerto Rico's employment landscape. The Act was the island's first significant labour reform legislation in decades, making significant changes to more than a dozen existing statutes, including those governing employment discrimination, wrongful termination, wages and hours, entitlement to vacation and sick leave, lactation breaks, and employee benefits. In addition, it requires that all Puerto Rico employment laws or regulations, in matters similar to those regulated by a law or regulation of the United States, be interpreted consistently with the law or regulation of the United States, unless Puerto Rico law expressly requires a different interpretation.

Protected employee categories

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 the United States chapter for further information.

Local anti-discrimination laws include Law No. 100 of 30 June 1959 (the General Anti-Discrimination Act), as amended in 2013 by Laws Nos. 22 and 107 and Law No. 44 of 2 July 1985 (the Disability Discrimination Act), Law No. 69 of 6 July 1985 (the Sex Discrimination Act), Law No. 17 of 22 April 1958 (the Sexual Harassment in Employment Act) and Law No. 3 of 13 March 1942 (the Working Mother's Protection Act – Maternity Leave Law). Some of these laws have been amended by Law No. 4. 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 No. 130 of 8 May 1945 (the Puerto Rico Labor Relations Act) prohibits discrimination based on certain labour-related activities. The Act further recognises the employees' right not to be discriminated or retaliated against based on criteria prohibited by law.

Enforcement agencies

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

Legal basis

4 Is there any legislation mandating or allowing the establishment of employees' representatives 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 the United States chapter for further information.

The Puerto Rico Constitution (article II, sections 17 to 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 No. 130 (the Puerto Rico Labor Relations Act) and Law No. 45 (the Public Service Labor Relations Act) also provide rules for union recognition comparable to the NLRA.

Powers of representatives

5 What are their powers?

See question 4.

BACKGROUND INFORMATION ON APPLICANTS

Background checks

6 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 and recent EEOC guidance concerning the potential disparate impact of background checks. See the United States 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.

The Act enumerates certain rights conferred upon employees, including respect for dignity and protection of privacy, subject to the employer's legitimate interests in protecting its business, property and workplace, or as provided by law.

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 the General Anti-Discrimination Act. 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.

Medical examinations

7 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 the United States chapter for further information.

Drug and alcohol testing

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

Puerto Rico Law No. 59 of 8 August 1997 (the 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 precondition 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 that 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; and
- 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 that 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; and
- 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: 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 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 precondition 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

Preference and discrimination

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

As noted in 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, the Unjust Dismissal Act, as amended by Law No. 4, requires that seniority preference be given to employees who were laid off owing to business necessities recognised under the Unjust Dismissal Act 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 reasonably clear and evident difference in favour of the capacity, productivity, performance, competence, efficiency or conduct record of the workers compared, in which case the employer may select the less senior worker on the basis of such criteria.

10 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 and non-compete agreements – require a valid written agreement, some with specific terms required for enforceability.

11 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 the Unjust Dismissal Act. Prior to the passage of Law No. 4, to be valid:

- the contract had to be in writing;
- the contract had to 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 had to be expressly stated in the written contract; and
- the contract had to be signed during the employee's first work day or, in the case of employees hired through a temporary employment services company, within the first 10 days of work.

The Act expands the definition of temporary employment by identifying some of the situations where it may exist, such as a specific project, fixed work, replacing a regular employee during a leave or temporary absence, or an extraordinary or short-term project (including, without limitation, equipment or facility repairs, cargo loading or unloading, seasonal work, temporary order for production increases, annual inventories, or any other particular project or activity). After the passage of Law No. 4, written temporary agreements are no longer required (though are advisable).

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.

The Act also recognises fixed-term employment contracts, defined as contracts for a specific period of time or for a particular project. Written agreements are not required (though are advisable). While fixed-term contracts may be renewed, if the practices create an expectation of continuity, the relationship will not be interpreted as being for a fixed term. Fixed-term contracts not exceeding three years will be presumed to be valid and bona fide. In the case of exempt executive, administrative and professional employees, fixed-term contracts will be interpreted by the parties' will as expressed in the contract.

Probationary period

12 | What is the maximum probationary period permitted by law?

Probationary periods are permissible in Puerto Rico and, as noted below, automatic for most employees hired after the passage of Law No. 4 on 26 January 2017. For the probationary period to be valid for employees hired before the passage of Law No. 4 on 26 January 2017:

- 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 Labor 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.

For employees hired on or after 26 January 2017, when Law No. 4 came into effect, the following rules apply: exempt executive, administrative, and professional employees have an automatic probationary period of 12 months, and all other employees have an automatic probationary period of nine months. Written probationary agreements are no longer required. If there is a union, the probationary period will be set by the employer and the union.

Classification as contractor or employee

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

Unless another special law applies, Law No. 4 creates an irrebuttable presumption that a person is an independent contractor if:

- he or she possesses or has requested an employer identification number or employer social security number;
- he or she has filed income tax returns claiming to own a business;
- the independent contractor relationship is established by written contract;
- he or she is contractually required to have licences or permits; and
- he or she complies with three or more of the following:
  - he or she has control or discretion in the way the work is performed;
  - he or she has control over the timing of the work;
  - there is no requirement to work exclusively for the principal;
  - he or she may hire employees to assist; and
  - he or she has invested to provide the services, including buying or renting tools, equipment or materials; obtaining leave from the principal to access the worksite; and renting space or equipment from the principal.

If the factors to establish the independent contractor presumption are not met, the 'common law test' is used to determine whether there is an employee or independent contractor relationship, including what the parties expressed in their contract and the degree of direct control exercised over the manner in which the work is performed. Unless required by a federal law applicable to Puerto Rico, the 'economic reality' test should not be used to evaluate whether an independent contractor relationship exists.

Temporary agency staffing

14 | Is there any legislation governing temporary staffing through recruitment agencies?

Law No. 26 of 22 July 1992 regulates the provision of temporary employees to client companies by temporary service companies. As a general rule under Law No. 26, both the temporary service company and the client company are considered joint employers. However, Law No. 26 delineates certain responsibilities of the temporary service company and those of the client company.

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, or more than 1,350 hours for employees hired on or after 26 January 2017, 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 No. 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 the Unjust Dismissal Act; or
- as a means of breaking, weakening or interrupting strikes or work stoppages.

Additionally, see question 11.

FOREIGN WORKERS

Visas

15 | 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 the United States chapter for further information.

Spouses

16 | Are spouses of authorised workers entitled to work?

See question 15.

General rules

17 | 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?

See question 15.

Resident labour market test

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

See question 15.

TERMS OF EMPLOYMENT

Working hours

19 | 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, and the Fair Labor Standards Act applies to covered employers and employees in Puerto Rico. See the United States chapter for further information.

Non-exempt employees are entitled to overtime pay for work in excess of 40 hours per week or eight hours in any calendar day (or, instead of calendar day, alternative 24-hour cycle determined by the employer, subject to certain requirements). Employees generally may not opt out of these statutory limitations.

Under Law No. 4, an employer and employee may agree in writing to establish an alternate working week in which an employee works 10 regular hours for four days (which do not have to be consecutive) each week, without incurring the employer's obligation to pay daily overtime. However, if, under the alternate working week, an employee works more than 10 hours in a day, the employee is owed overtime. Alternate week schedule agreements must be in writing and voluntary.

Law No. 379 of 15 May 1948 (the Puerto Rico Working Hours and Days Act), as amended by Law No. 4, establishes generally that non-exempt employees must be allowed a fixed meal period of no less than one hour (a shorter period of at least 30 minutes may be allowed by written agreement; certain limited professions are allowed to reduce the meal period to at least 20 minutes by written agreement). The meal period generally must start between the conclusion of the second 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. However, if an employee does not work more than six hours in a day, the employer is not required to provide a meal period. Non-exempt employees are also entitled to a second meal period if they work more than 10 hours in a day. However, if an employee does not work more than 12 hours in a day, the employer is not required to provide a second meal period if the employee took the first meal period. Minors are entitled to a second meal period after four consecutive hours of work.

Law No. 1 of 1 December 1989 (the Puerto Rico Closing Law), which generally applied to certain retailers and wholesalers with 25 employees or more, required that covered establishments be closed from 5am to 11am on Sundays and on New Year's Day, Epiphany, Good Friday, Easter Sunday, Mother's Day, Father's Day, General Elections Day, Thanksgiving Day and Christmas Day. Certain premium pay was required for work during these days. The Act largely repealed the Closing Law. Establishments covered by the Closing Law prior to the passage of Law No. 4 must remain closed on Good Friday and Easter Sunday. Under Law No. 4, employers are no longer required to pay premium compensation to employees who work on Sunday.

Further, non-exempt employees covered by Law No. 289 of 1946, as amended by Law No. 4, 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 if the employee was hired before 26 January 2017, and at time and a half (one and a half times the rate) if the employee was hired on or after 26 January 2017. Employees may not opt out of these statutory protections.

Overtime pay

20 | 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). Regulation No. 13 also recognises the outside sales exemption and that certain computer professions may qualify for the professional exemption. The Act further adopts all exemptions under the FLSA. See the United States chapter for further information.

Overtime pay is required for non-exempt employees who work in excess of 40 hours per week or eight hours in any calendar day (or, instead of calendar day, an alternative 24-hour cycle determined by the employer, subject to certain requirements). As a general rule, Law No. 379 requires the payment of overtime at a rate equal to twice the employee's regular rate if the employee was hired before 26 January 2017. In *Vega v Yiyi 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 one and a half times the employee's regular rate of pay.

Under Law No. 4, overtime for employees hired on or after 26 January 2017 is compensated at one and a half times the regular rate. Employees with a right to greater benefits before 26 January 2017 preserve the greater benefit while they work for the same employer.

21 | Can employees contractually waive the right to overtime pay?

Employees cannot contractually waive the right to overtime pay.

However, as noted in question 11, under Law No. 4, an employer and employee may agree in writing to establish an alternate working week in which an employee works 10 regular hours for four days (which do not have to be consecutive) each week, without incurring the employer's obligation to pay daily overtime. However, if, under the alternate working week an employee works more than 10 hours in a day, the employee is owed overtime. Alternate week schedule agreements must be in writing and voluntary.

Vacation and holidays

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

There is legislation establishing the right to vacation time in Puerto Rico. Before the enactment of Law No. 4, under Puerto Rico Law No. 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, accrued vacation at the rate of one and a quarter days for each month in which the employee worked at least 115 hours. Under

Law No. 4, the minimum hours worked in order to accrue vacation has been increased from 115 to 130 hours per month.

For covered employees hired after 26 January 2017, the minimum monthly accrual of vacation leave is half a day during the first year of service; three-quarters of a day after the first year and until the fifth year; one day after five years until 15 years; and one and a quarter days after 15 years. However, if an employer has no more than 12 employees, the minimum monthly accrual of vacation leave is a fixed half a day per month. Employees who worked for an employer before 26 January 2017 and had rates of accrual of vacation superior to that provided for in Law No. 4, continue to have the same accrual rates while they work for the same employer.

There is no general law establishing the right to holidays in the private sector. However, as noted in question 19, establishments in industries previously covered by the now-repealed Puerto Rico Closing Law must be closed on Good Friday and Easter Sunday.

Sick leave and sick pay

23 | 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.

Before the enactment of Law No. 4, under Puerto Rico Law No. 180, all workers in Puerto Rico employed on or after 1 August 1995, with the exception of administrators, executives and professionals, accrued paid sick leave at the rate of one day per month for each month in which the employee worked at least 115 hours. Under Law No. 4's amendments to Law No. 180, the minimum hours worked in order to accrue paid sick leave has been increased from 115 to 130 hours per month. Sick leave accrual remains one day for each month the covered employee works at least 130 hours.

Two laws were passed in 2018 that provide more rights and benefits to Puerto Rico workers by granting protections on the use of sick leave by public and private employees. First, Law No. 60 of 2018 amends Law No. 180 to forbid employers in the private sector to use excused, justified sick leave as a criterion in evaluations, promotions or salary increases, or to justify disciplinary measures. In addition, Law No. 60 amends Law No. 180 to make clear that sick leave does not excuse non-compliance with validly established employer rules, such as attendance, punctuality and others. Second, Law No. 28 of 2018 (the Special Leave for Employees with Grave Illnesses of Catastrophic Character Act) creates a special paid sick leave of six days annually for employees in the private or public sectors who have certain illnesses, including AIDS, tuberculosis, leprosy, lupus, cystic fibrosis, cancer, haemophilia, aplastic anaemia, rheumatoid arthritis, autism, post-organ transplantation, scleroderma, multiple sclerosis, amyotrophic lateral sclerosis and chronic kidney disease at levels 3, 4 and 5.

Leave of absence

24 | 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 the United States 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 and sick leave, leave under Law No. 428 of 15 May 1950 (the Social Security for Chauffeurs Act), the Puerto Rico Automobile Accident Compensation Administration (ACAA), the Non-Occupational Disability Benefits Act, the State Insurance Fund, and leave for maternity or breastfeeding, jury duty, and several other reasons (eg, special sports, criminal case witness and drivers' licence renewal).

Aside from vacation and sick leave, discussed in questions 22 and 23, the main Puerto Rico leave laws include the following.

The 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 No. 54 of 10 March 2000 amended the Puerto Rico Working Mothers Protection Act to extend maternity leave benefits to adoption.

Law No. 427 of 16 December 2000 (the Breastfeeding Statute) requires that employers provide full-time (at least seven and a half hours per day) nursing mothers the opportunity to breastfeed or express breast milk for one hour each day, which can be broken up into two 30-minute periods or three 20-minute periods. The Act extends the right to lactation breaks to part-time employees whose workday exceeds four hours. Their lactation break must be 30 minutes for each period of four consecutive hours of work. In small businesses, lactation breaks must be half an hour each workday, which can be broken up into two 15-minute periods.

The Social Security for Chauffeurs Act establishes a social security plan that 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) of the date on which the worker is discharged from medical treatment, so long as the request is made within one year of 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 No. 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 of the date on which the worker is discharged from medical treatment, so long as the request is made within six months of 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 No. 139 of 26 June 1968 (the Non-Occupational (Short-Term) Disability Benefits Law), as amended by Law No. 4, 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 the employee requests reinstatement within 15 days of the date on which the worker is discharged from medical treatment, so long as the request is made within 12 months of the date of commencement of the disability (or six months for employers that had 15 or fewer employees at the date of the accident or incapacitation); 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 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 of the date on which the worker is discharged from medical treatment, so long as the request is made within 12 months (not one year) of the date of commencement of the disability.

There are multiple other local leave laws, each with different duration, eligibility and other requirements.

Mandatory employee benefits

25 | What employee benefits are prescribed by law?

See questions 22, 23 and 24.

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

Part-time and fixed-term employees

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

Yes. Under Law No. 4, temporary and fixed-term employees are not subject to the Unjust Dismissal Act. See question 11.

In addition, there are various laws that provide for different entitlements for part-time and full-time employees. For example, Law No. 4's amendments to the Breastfeeding Statute provide that if an employee works part-time (ie, less than seven and a half hours a day) and the workday exceeds four hours, the employee is to be provided with a lactation break of 30 minutes for each period of four consecutive hours of work.

Public disclosures

27 | Must employers publish information on pay or other details about employees or the general workforce?

Federal EEO-1 reporting requirements apply in Puerto Rico. See the United States chapter for further information.

The Puerto Rico Equal Pay Act (PREPA), passed into law on 8 March 2017, prohibits gender discrimination in compensation. PREPA also imposes prohibitions on an employer's ability to inquire about a job applicant's prior salary data, limits restrictions on employee wage discussions and inquiries and imposes related civil damages and penalties.

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

28 | 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), as clarified in *PACIV, Inc v Perez Rivera*, 159 DPR 523 (2003), 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.

Post-employment payments

29 | 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

Extent of liability

30 | 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:

- the employee's desire to serve, benefit or further his or her employer's business or interest;
- whether the act is reasonably related to the scope of the employment; and
- 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 F3d 254, 261 (First Circuit 2009)).

TAXATION OF EMPLOYEES

Applicable taxes

31 | What employment-related taxes are prescribed by law?

Employers in Puerto Rico are responsible for income tax withholding and withholding for the 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.

The Act clarified that the Unjust Dismissal Act's severance payments are only subject to deductions for Medicare and Social Security; not federal or local income tax. As a result, in 2018, the Puerto Rico Treasury revised form 480.6D and issued additional guidance concerning the tax treatment and reporting of the Unjust Dismissal Act payments.

EMPLOYEE-CREATED IP

Ownership rights

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

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 the United States chapter for further information.

Trade secrets and confidential information

33 | 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 No. 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. See the United States chapter for further information.

DATA PROTECTION

Rules and obligations

34 | 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.

The Act enumerates certain rights conferred upon employees, including respect for dignity and protection of privacy, subject to the employer's legitimate interests in protecting its business, property, and workplace, or as provided by law.

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 apply to the data.

BUSINESS TRANSFERS

Employee protections

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

As explained in question 36, the Unjust Dismissal Act requires that there be termination for 'just cause' or the payment of a statutory severance.

The Unjust Dismissal Act 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 the former owner 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 Unjust Dismissal Act severance (see question 36), 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 the Unjust Dismissal Act benefits to the employee laid off, there also being established a lien on the business sold, to answer for the amount of the claim.

The Act defines 'transfer of ongoing business' as the sale or purchase through which one employer sells a substantial portion of the passive or active assets of the business to another, without interruption of the operations for six months or more; the new employer continues operating the same type of business in the same location, or different location but with the same equipment, machinery and inventory, providing the same services, retaining the same or similar business name or marks, so long as the majority of the employees working in the new business at any time during the six months following the transfer worked with the prior employer at the time of transfer.

TERMINATION OF EMPLOYMENT

Grounds for termination

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

The Unjust Dismissal Act, as amended by Law No. 4, requires that termination be for 'just cause' (or the payment of a statutory severance). A termination is for 'just cause' if it is not motivated by legally prohibited reasons or the product of the employer's caprice. Just cause is understood as those reasons affecting the good and normal operation of the establishment, including:

- the employee engaging in a pattern of improper or disorderly conduct. Improper conduct is defined as voluntary infraction of the employer's norms or instructions that are not contrary to law; illegal or immoral acts; or acts or omissions that adversely and significantly impact the employer's legitimate interests or others' well-being, done in a premeditated, intentional or indifferent manner. Disorderly conduct is defined as voluntary infraction that alters the peace, tranquillity, good order and respect that must exist in the workplace;
- the employee engaging in a pattern of performance that is inefficient, unsatisfactory, poor, tardy or negligent, including not complying with the employer's norms and standards of quality and security, low productivity, lack of competence or ability to perform

the work at reasonable levels required by the employer, and repeated complaints from the employer's clients;
- the employee repeatedly violating the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been opportunely furnished to the employee;
- full, temporary 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 or with the purpose of increasing the establishment's productivity or competitiveness.

If the employer relies on any of the last three causes, it must retain employees of greater seniority on the job, provided there are positions that are vacant or filled by employees of less seniority within their occupational classification ('order of retention analysis'), except in those cases in which there is a reasonably clear or evident difference in favour of the capacity, productivity, performance, competency, efficiency or record of comparable employees, in which case the employer may choose based on those criteria.

Under Law No. 4, employers with multiple locations in Puerto Rico must, in general, consider the employees within the particular location that is to be impacted for the order of retention analysis after Law No. 4. However, occupational classifications in other locations should be considered for the order of retention analysis if, during the year prior to the termination the employees within the impacted occupational classification transferred usually or regularly from location to location; and the employees are under direct common supervision with respect to day-to-day personnel administration. The fact that the employees in the various locations are covered by common policies or participated in common benefits is irrelevant. Only the locations that fit within these characteristics have to be considered, as opposed to all locations in the island.

The Unjust Dismissal Act 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 9.

Notice

37 | 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 Act (WARN) 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 the United States chapter for further information.

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

As noted in question 37, WARN applies in Puerto Rico, including its pay in lieu of notice provisions, which provide that an employer that violates the WARN 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 the United States chapter for further information.

Severance pay

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

Yes, as noted in question 36, under the Unjust Dismissal Act, as amended by Law No. 4, indefinite-term employees actually or constructively discharged without just cause are entitled to severance payments.

For employees hired on or after 26 January 2017 (when Law No. 4 was signed), severance pay is: an amount equivalent to three months' salary; and an amount equivalent to two weeks' salary for each year of service. For employees hired on or after 26 January 2017, the severance is capped at nine months. Employees hired before Law No. 4's effective date are not subject to the cap, and severance pay is based on years of service (YOS) and highest salary 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+ years	6 months	3 week/YOS

Any voluntary payment made by the employer to the employee solely because of the termination of employment can be credited to the Unjust Dismissal Act's severance obligation.

Procedure

40 | Are there any procedural requirements for dismissing an employee?

No. No prior government agency approval is required for termination.

Employee protections

41 | In what circumstances are employees protected from dismissal?

Puerto Rico is not an 'at-will' jurisdiction. Instead, the Unjust Dismissal Act requires just cause as defined by law (see question 36) 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-blowing or other protected activities. In addition, various local leave laws provide for the reservation of employment during covered leave periods. See question 25.

Mass terminations and collective dismissals

42 | Are there special rules for mass terminations or collective dismissals?

As noted in question 37, WARN applies in Puerto Rico. See the United States chapter for further information.

Further, as noted in question 36, if the employer relies on a business necessity just cause as defined by the Unjust Dismissal Act, as amended by Law No. 4, it must retain employees of greater seniority on the job, provided there are positions that are vacant or filled by employees of less seniority within their occupational classification, except in those cases in which there is a reasonably clear or evident difference in favour of the capacity, productivity, performance, competency, efficiency or record of comparable employees, in which case the employer may choose based on those criteria.

Under Law No. 4, employers with multiple locations in Puerto Rico must, in general, consider the employees within the particular location that is to be impacted for the order of retention analysis after

Law No. 4. However, occupational classifications in other locations should be considered for the order of retention analysis if, during the year prior to the termination the employees within the impacted occupational classification transferred usually or regularly from location to location; and the employees are under direct common supervision with respect to day-to-day personnel administration. Only the locations that fit within these characteristics have to be considered, as opposed to all locations in the island. See question 36.

The Unjust Dismissal Act 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 9.

Class and collective actions

43 | 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.

Mandatory retirement age

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

There are no Puerto Rico-specific statutes regulating employers' decisions to impose a mandatory retirement age. With few exceptions, the federal Age Discrimination in Employment Act, which applies in Puerto Rico, specifically prohibits private employers from imposing mandatory retirement on employees over the age of 40, if the retirement is based on the employee's age.

DISPUTE RESOLUTION

Arbitration

45 | May the parties agree to private arbitration of employment disputes?

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

Employee waiver of rights

46 | 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 claims, see the United States chapter.

The Unjust Dismissal Act, as amended by Law No. 4, expressly prohibits agreements in which an employee prospectively waives the Unjust Dismissal Act's severance entitlements. However, under Law No. 4, once a discharge or notification of an intent to discharge has occurred, there can be a compromise as to the Unjust Dismissal Act severance whenever all the requirements for a valid settlement agreement are present.

Limitation period

47 | What are the limitation periods for bringing employment claims?

Different statutes of limitations govern the different local employment statutes. Under Law No. 4, actions arising from an employment contract or the benefits that arise from an employment contract have a one-year statute of limitations, unless otherwise provided in a special law or in the employment contract. Causes of action that arose before Law No. 4 took effect have a statute of limitations prescribed under prior applicable law. Claims for unjust termination under the Unjust Dismissal Act that arose before Law No. 4 took effect on 26 January 2017 are subject to a three-year statute of limitations; and claims that arose once Law No. 4 took effect have a one-year statute of limitations. The statute of limitations for wage and hour claims that arose before Law No. 4 took effect is three years; and claims that arose once Law No. 4 took effect have a one-year statute of limitations, counting from the end of the employee's employment. The statute of limitations for retaliation claims under Law No. 115 is three years. Other employment claims have different limitation periods.

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UPDATE AND TRENDS

Emerging trends

48 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction?

There have been various legislative efforts to repeal the Unjust Dismissal Act in its entirety (to render Puerto Rico an 'at-will' jurisdiction) over the past year, but those efforts have not yet achieved traction. The debate over the potential repeal of the Unjust Dismissal Act is expected to continue throughout 2019.