

Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

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Labour & Employment 2021

Contributing editors

**Matthew Howse, K Lesli Ligorner, Walter Ahrens,
Michael D Schlemmer and Sabine Smith-Vidal**

Morgan, Lewis & Bockius LLP

Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Labour & Employment*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Hong Kong, Hungary, Mauritius, Romania, Singapore and Taiwan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D Schlemmer and Sabine Smith-Vidal of Morgan, Lewis & Bockius LLP, for their continued assistance with this volume.



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Puerto Rico

Melissa C Rodriguez

Morgan, Lewis & Bockius LLP

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, which is 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.

Under 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. Also, 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. The Puerto Rico Department of Labor and Human Resources issued the first edition of its Guide for the Interpretation of Puerto Rico's Employment Legislation on 8 May 2019, containing discussion, interpretation and analysis of the changes brought forth by Law No. 4.

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 US federal laws and local laws in Puerto Rico prohibiting discrimination and harassment in employment.

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;
- 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, and others. 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 against or retaliated against based on criteria prohibited by law.

Further, on 8 March 2017, former governor Ricardo Rosselló signed the Puerto Rico Equal Pay Act, which, among other things, prohibits gender discrimination in compensation. Also, on 8 October 2019, Governor Wanda Vazquez signed into law Act 150-2019, which took effect immediately and prohibits employers (or potential employers) from, among other things, taking adverse employment actions based on an employee's or applicant's credit history report.

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 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, the Bureau of Work Norms and the Anti-Discrimination Unit) and the local workers' compensation agency (the 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 with 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.

The Puerto Rico Constitution (article II, sections 17 to 18) provides that employees of private employers, or 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?

As in the United States, the NLRA applies in Puerto Rico to covered employers engaged in interstate commerce. The NLRA provides covered employees with 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.

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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?

The Puerto Rico Equal Pay Act prohibits employers covered under the Act from asking a job applicant or the applicant's current or former employer about the applicant's current or past compensation rate, subject to the following exceptions:

- if a job applicant voluntarily discloses his or her current or past wages, the potential employer may confirm or allow the applicant to confirm the information; and
- the potential employer may inquire into or confirm an applicant's current or past wages if it negotiated the compensation rate with and made an offer of employment to the applicant.

Further, except for certain exempt positions (eg, positions for which a credit report is required by federal law), Act 150-2019 prohibits covered employers from verifying or investigating an employee's or applicant's credit history or requesting or obtaining from a credit agency an employee's or applicant's credit report.

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 guidance from the Equal Employment Opportunity Commission concerning the potential disparate impact of background checks.

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 the law against abusive attacks on his honour, reputation and private or family life') of the Puerto Rico Constitution.

Law 4 of 26 January 2017 (Labor Transformation and Flexibility 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.

The Puerto Rico Supreme Court had previously held in *Rosario Diaz v Toyota de Puerto Rico, Corp*, 2005 TSPR 154 (2005) that discrimination based on 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) and set out factors that employers had to consider in connection with an applicant who has criminal convictions. In July 2020, the Puerto Rico Supreme Court effectively overturned the *Rosario Diaz* decision in *Garib Bazain v Hosp Espanol Auxilio Mutuo de Puerto Rico*, 2020 TSPR 69 (2020) by holding that conviction status is not a protected class under Puerto Rico's Constitution or anti-discrimination laws.

The aforementioned considerations apply irrespective of whether the employer conducts its own background or criminal 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. US federal law applies in this area.

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 and 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 rehire 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 24 hours; and
- as a precondition for recruitment and as part of a general physical medical examination required of all candidates for employment.

Before 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, the effective date and the specific law that authorises its adoption). The drug testing must be carried out under 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, according 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 generally.

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 railway 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 contact 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.

Also, 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, concerning 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?

Employers are prohibited from discriminating against applicants or employees based on 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 of 26 January 2017 (the Labor Transformation and Flexibility Act (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 if 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 based on such criteria.

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

No. Generally, 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, alternate workweek or work schedule agreements, 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. Before 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 workday 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 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 or a particular project. Written agreements are not required (though are advisable). Although 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 an 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 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 had to be in writing;
- the probationary contract had to be signed before engaging in any type of work;
- the probationary period included in the written contract had to be for a fixed period not to exceed the first 90 calendar days of employment (which could be extended up to 180 days with Secretary of Labor approval); and
- the contract had to establish the specific date on which the probationary period would commence and the precise date on which it would end. The probationary period could not be extended at the discretion of the employer. If the employee continued working after the end of the probationary period, he or she would 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 how 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, under 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.

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.

Spouses

- 16 | Are spouses of authorised workers entitled to work?

Puerto Rico is subject to US federal immigration laws governing foreign workers.

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?

Puerto Rico is subject to US federal immigration laws governing foreign workers.

Resident labour market test

- 18 | 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.

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.

Non-exempt employees are entitled to overtime pay for work more than 40 hours per week or eight hours in any calendar day (or, instead of a calendar day, an 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 of 26 January 2017 (the Labor Transformation and Flexibility Act (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 break of no less than one hour (a shorter break of at least 30 minutes may be allowed by written agreement; certain limited professions are allowed to reduce the meal break to at least 20 minutes by written agreement). The meal break 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 break. However, if an employee does not work more than six hours a day, the employer is not required to provide a meal break. Non-exempt employees are also entitled to a second meal break if they work more than 10 hours a day. However, if an employee does not work more than 12 hours a day, the employer is not required to provide a second meal break if the employee took the first meal break. Minors are entitled to a second meal break 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 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 before 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.

Overtime pay is required for non-exempt employees who work more than 40 hours per week or eight hours in any calendar day (or, instead of a 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 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 should 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, 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.

Also, under Law No. 4, an employer may (but does not have to) allow an employee who had days or hours off for personal leave to work additional hours on another day to make up time lost. These make-up work hours will not be considered extra hours that require overtime if the work hours are made up in the same week of the absence, the employee does not work more than 12 hours in a day, and the employee does not work more than 40 hours per week.

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, except for 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 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, 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, except for 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 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. Also, 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.

Law No. 37 of 9 April 2020, which amends Law No. 180, provides that any employee covered by Law No. 180 who suffers (or is suspected to suffer) the disease that results in a state of emergency declared by the Governor or the Secretary of Health:

- can use any paid leave available once the sick leave under Law No. 180 has been exhausted; and
- if the employee continues to be sick, he or she will receive a special five days of emergency sick leave, once all other available leave has been exhausted.

Law No. 37 also prohibits using the leave provided by the law as a basis for disciplinary actions (eg, termination or suspension) or as criteria for evaluating employees for promotions or wage increases.

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?

US federal leave laws (eg, the Family and Medical Leave Act) apply in Puerto Rico.

Also, 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, 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 Also 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 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 the 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?

Such benefits include, among others, vacation time, sick leave, leaves of absence or time off (eg, maternity leave) and compensation for medical and disability expenses resulting from traffic accidents.

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.

Also, various laws 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?

US federal EEO-1 reporting requirements apply in Puerto Rico. US federal law applies in this area.

The Puerto Rico Equal Pay Act prohibits gender discrimination in compensation. It 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 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 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?

Generally, 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.

EMPLOYEE-CREATED IP

Ownership rights

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

Employee inventions are handled under the federal legal framework concerning 'works made for hire' under the US Copyright Act of 1976, 17 USC sections 101 et seq.

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.

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.

Law No. 4 of 26 January 2017 (the Labor Transformation and Flexibility 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.

- 35 | Do employers need to provide privacy notices or similar information notices to employees and candidates?

In the area of applicable notice obligations, US federal law applies. Under Puerto Rico local law, the obligation to provide a written notice arises in a variety of contexts. For example:

- Act No. 111 of 7 September 2005 (the Citizen Information on Data Banks Security Act) requires that every entity that owns or is the custodian of a database containing the personal information of citizens that are residents of Puerto Rico, or that provides access to such a database notify citizens of any security breach in the system; and
- Act No. 111 encompasses personal information, such as:
 - an individual's social security number;
 - driver's licence number;
 - voter's identification or other official identification;
 - bank or financial account numbers of any type with or without passwords or access codes that may have been assigned;

- the names of users and passwords or access codes to public or private information systems;
 - medical information protected by the Health Insurance Portability and Accountability Act;
 - tax information; and
 - work-related evaluations; and
- Act No. 111, the Puerto Rico Department of Consumer Affairs adopted Regulation No. 7367, which enforces the obligation on entities to notify citizens of any security breach or irregularity, when its database contains all or part of their personal information and the information is not protected by cryptographic code;
 - constitutional case law, requires employers to provide notice before implementing an employee surveillance programme; and
 - Act No. 59, requires employers implementing a drug-testing programme to provide written notice containing specific information.

36 | What data privacy rights can employees exercise against employers?

Under Puerto Rico local law, privacy rights can be asserted in a variety of contexts

Puerto Rico's Constitution guarantees an individual's right to privacy under article II, sections 1 and 8. Specifically, article II, section 8 of the Constitution states that 'every person has the right to the protection of the law against abusive attacks on his honour, reputation, and private or family life'. The constitutional right to privacy operates *ex proprio vigore* and may be enforced by an individual against his or her private employer without the need for state action. To prevail, the employee must present evidence of the employer's concrete actions that infringe upon his or her private or family life under circumstances where he or she had a legitimate expectation of privacy. Under the case law that has developed in this area of constitutional law, an employer must generally provide prior notice to employees when implementing electronic surveillance systems.

Puerto Rico's legislation prohibiting discrimination owing to sexual orientation and gender identity (Act No. 22 of 29 May 2013) requires employers to keep information about gender identity and sexual orientation confidential.

Under Act No. 83 of 1 August 2019, employers in Puerto Rico must also take steps to protect the identity of domestic violence victims who are at risk in the workplace.

Puerto Rico prohibits employers from verifying or investigating credit history or credit reports concerning employees or candidates, or from obtaining or ordering credit reports from a credit agency. With some exceptions, the Act also prohibits employers from taking adverse employment actions based on credit history or information contained in a report.

Act No. 59 of 8 August 1997, requires employers who perform drug tests on job applicants and employees in the private sector to treat test results and related data confidentially.

Act No. 207 of 17 September 2006 prohibits the use of employees' social security numbers on identification cards or any document of general circulation, and it also prohibits employees' social security numbers from being displayed in places that are visible to the public and from inclusion in personnel directories or in any list that is made available to persons who do not need to know or access this information.

An employee could also bring a cause of action for failure to follow the disclosure requirements of Act No. 111. Act No. 234 of 19 December 2014 requires private and governmental entities to destroy, dispose, or otherwise make personal information unreadable or indecipherable.

BUSINESS TRANSFERS

Employee protections

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

The Unjust Dismissal Act requires that there be a 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. If 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, and the purchaser shall retain the corresponding amount from the selling price stipulated concerning the business. If 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

38 | 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 of 26 January 2017 (the Labor Transformation and Flexibility Act (Law No. 4)), requires that termination is for 'just cause' (or the payment of a statutory severance). 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 a 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 a 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 to increase 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 some positions 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, generally, 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 before 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 concerning 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 on 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.

Notice

39 | 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. Puerto Rico does not have a local WARN statute.

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

WARN applies in Puerto Rico, including its payment 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.

Severance pay

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

Yes, 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 plus 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 the individual's highest salary in the previous three years.

	Part A	Part B
0-5 years	2 months	1 week per YOS
5-15 years	3 months	2 weeks per YOS
Over 15 years	6 months	3 weeks per 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

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

No prior government agency approval is required for termination.

Employee protections

43 | In what circumstances are employees protected from dismissal?

The Unjust Dismissal Act requires just cause as defined by law 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 based on whistle-blowing or other protected activities. Also, various local leave laws provide for the reservation of employment during covered leave periods.

Mass terminations and collective dismissals

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

The US WARN applies in Puerto Rico.

Further, 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 some positions 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, generally, 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 before 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 concerning day-to-day personnel administration. Only the locations that fit within these characteristics have to be considered, as opposed to all locations on 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.

Class and collective actions

45 | 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

46 | 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

47 | 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

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

Generally, employees may release employment claims for valid consideration, unless otherwise prohibited by law. Concerning information regarding valid releases of the US Age Discrimination in Employment Act and Fair Labor Standards Act claims, US federal law applies in this area.

The Unjust Dismissal Act, as amended by Law No. 4 of 26 January 2017 (the Labor Transformation and Flexibility Act (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

49 | 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 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.

UPDATE AND TRENDS

Key developments of the past year

50 | Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

Act 90 of 7 August 2020 (Act 90) prohibits workplace harassment and bullying (even if such conduct is unrelated to any particular protected characteristic) and creates a specific cause of action against employers who perpetrate, encourage or fail to prevent workplace harassment, as defined by the law. Act 90, which applies to private and public employers, also imposes on employers the obligation to implement measures to eliminate or reduce workplace harassment and bullying.

Prohibited conduct under Act 90 includes malicious, unwanted, repetitive, abusive, arbitrary, unreasonable and or capricious conduct (verbal, written and or physical), outside the legitimate interests of the employer, unwanted by the person, which infringes on the person's protected constitutional rights (eg, the inviolability of the dignity of the person, protection against abusive attacks on the person's honour, reputation and or private or family life, and the protection of the worker against risks to health or personal integrity in the workplace) and which creates an intimidating, humiliating, hostile or offensive work environment, unsuitable for the reasonable person to perform his or her duties or tasks in a normal manner.

Examples of harassing or bullying conduct under Act 90 include but are not limited to:

- unfounded threats of termination in the presence of co-workers;
- the rejection of work proposals or opinions in a humiliating manner; and
- humiliating and hostile comments about a lack of professional qualifications in the presence of co-workers

Act 90 requires employers to implement a protocol for handling complaints of workplace harassment and bullying, including mechanisms to investigate all of them and address complaints, as well as posting requirements.

Act 90 requires employees to exhaust internal remedies provided by the employer and administrative remedies (mediation with the Alternate Dispute Resolution Bureau of the Judiciary) before filing a claim in court. Act 90 provides for double damages and there is no statutory cap, as well as for individual liability.

In February 2021, the Puerto Rico Department of Labor issued guidelines for compliance with Act 90.

Coronavirus

51 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Puerto Rican government has enacted several measures in response to the covid-19 pandemic. In March 2020, the Puerto Rico Governor issued an Executive Order temporarily closing all commercial businesses, except for essential businesses. The Puerto Rico Secretary of the Department of Economic Development and Commerce issued Circular Letter 2020-02 to provide additional guidance to the industrial, commercial and business sector regarding the applicability of the Executive Orders and their exemptions. The operations exempted fall into seven major groups: health, food, fuels (processing, sales and distribution), critical infrastructure, local and national security, goods and services, and supply chain.

Since then, and throughout 2020 and the beginning of 2021, the Governor of Puerto Rico has continued to issue Executive Orders expanding the business that could operate and setting out operational restrictions and requirements. Among others, employers are required to submit a contagion contingency plan to the Puerto Rico Department of Labor (PRDOL). PRDOL Opinion letter 2020-03 implements the contagion contingency plan requirements.

Also, the PRDOL has issued opinions in response to the covid-19 pandemic concerning employment rights. On 23 March 2020, it issued an opinion stating, among other things, that during the applicable quarantine period:

- for non-exempt employees, employers may consider the time off as vacation only if the employee agrees, and if the employee does not agree, the time is unpaid and not counted as vacation; and
- employers may allow non-exempt employees to use paid sick leave if the employee asks for it, either as a first option or once vacation time is exhausted (again, if the employee agrees to charge to vacation).

Law No. 37 of 9 April 2020, which amends Law No. 180, provides that any employee covered by Law No. 180 who suffers (or is suspected to suffer) the disease that results in a state of emergency declared by the Governor or the Secretary of Health:

- can use any paid leave available once the sick leave under Law No. 180 has been exhausted; and
- if the employee continues to be sick, he or she will receive a special five days of emergency sick leave, once all other available leave has been exhausted.

Law No. 37 also prohibits using the leave provided by the law as a basis for disciplinary actions (eg, termination or suspension) or as criteria for evaluating employees for promotions or wage increases.

Morgan Lewis

Melissa C Rodriguez

melissa.rodriguez@morganlewis.com

101 Park Avenue
New York, NY 10178
United States
Tel: +1 212 309 6000
Fax: +1 212 309 6001
www.morganlewis.com

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