Labour & Employment 2015

Chile

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Estudio Jurídico Otero

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Reference

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1 May foreign employers hire employees directly in your jurisdiction or is it necessary to act through a local subsidiary? Are secondments or loans of personnel lawful?

Both alternatives are possible, although hiring through a local entity is advisable for tax and practical reasons. Nevertheless, if hiring is done by a foreign employer, it must obtain a tax ID and grant a power of attorney to a local agent who must have the legal capacity to receive service of notice on behalf of the employer and represent it for all labour matters in Chile. Additionally, foreign employers hiring employees in Chile may be exposed to the risk of being considered as permanent establishments in Chile.

2 Is there a limit to the number (or ratio) of foreign employees an employer may have in your jurisdiction?

Labour law states that at least 85 per cent of the employees hired by a company must be Chilean. This rule does not apply to employers with less than 25 employees. Specialised and technical employees who cannot be replaced by local employees are not to be considered for these purposes. Employees married to a Chilean, widower of a Chilean, with Chilean sons or domiciled in Chile for more than five years are considered as Chilean for these purposes.

3 May labour or employment agreements, and the termination of those agreements, be subject to any legislation other than that of your jurisdiction?

Labour laws are considered of public order and thus labour or employment agreements, termination of those agreements and any other labour issues are subject only to local laws and Chilean courts.

4 What are the requirements for an enforceable agreement? Are there any formalities that labour or employment agreements must adopt to be enforceable in your jurisdiction? Are fees, duties or taxes generated by any of them?

Labour relationships are a matter of fact due to the application of the reality principle. Consequently, if a dependency and subordination relationship exists, then there also exists a labour relationship that can be enforceable before a Court. A labour relation is considered as a consensual agreement and does not need to be written in order to exist. Therefore, a written agreement is needed so as to have clear terms and conditions (see question 5). Article 10 of the Labour Code sets forth the information which must be contained by written agreement, such as:

- the date and place of the agreement;
- the complete identification of the parties, including the employee's nationality and date of birth;
- the nature of the job;
- the place where it must be carried out;
- the salary;
- the form and date of salary payment;
- the work shift; and
- the terms of the contract.

In terms of formalities, labour agreements are not subject to any kind of registration or special formalities, unless the employee is a foreigner. In that case, and for immigration purposes, the agreement must be signed before a notary public and include some especial clauses.

5 What are the implications of hiring personnel without a clear, written, employment agreement in place? May this have any effect in the event of litigation?

Article 9 of the Labour Code expressly states that an employment agreement be reached verbally or in writing. However, a written agreement must always be signed:

- within 15 days after the employee started to render his or her services; or
- within five days, if he or she is hired for a specific task, work or job that will take less than 30 days.

In the absence of a written agreement, terms and conditions shall be determined by the employee declaration and an administrative fine against the employee can be applied.

6 What are the employers' obligations (social security and related benefits) regarding employees after contracting? Are any social benefits tax deductible? Are these applicable to foreign employees?

Employers must declare, withhold and pay taxes on Chilean-source income on behalf of employees within the first 12 days of the month following the payment of remuneration, regardless of the place of payment of that compensation. The income tax rates and deductibilities are set out in the tables below.

	Income bracket in Chilean pesos + tax rates (monthly bases)			
	From	To	Rate	Effective rate
Income tax brackets & rates	0,00	540,067.50	Exempt	0%
	540,067.51	1,200,150.00	4%	2.20%
	1,200,150.01	2.000,250.00	8%	4.52%
	2,000,250.01	2,800,350.00	13.5%	7.09%
	2,800,350.01	3,600,450.00	23%	10.62%
	3,600,450.01	4,800,600.00	30.4%	15.57%
	4,800,600.01	6.000,750.00	35.5%	19.55%
	6,000,750.01	More	40%	More than 19.55%

	Income tax bracket adjusted monthly for inflation. Brackets shown here from January 2013.		
	Type of tax	Calculation basis threshold*	Social tax rates
Employee social taxes and thresholds	Social security contributions**	67.4	21% approx
	Unemployment insurance***	101.1	0.6%
	Unemployment insurance	101.1	2,4%
	Labour accidents and professional diseases insurance	67.4	0.95%
	Survivorship and disability insurance	67.4	1.15%

* Indexed every year, figures in Unidades de Fomento (UF).

** Includes health insurance, pension funds contributions and health, illness, disability and death insurance.

*** This insurance is financed by payments made both by the employee and the employer.

All percentages are calculated on gross salary.

7 What benefits, other than cash remuneration are employees in your jurisdiction entitled to? What severance entitlements may employees claim?

There are several different benefits applicable, depending on the specific case, region, among others. Some of the most common benefits, other than cash remuneration (salary), that the employee is entitled to under Chilean law include the following:

- Weekly working hours cannot exceed 45 hours a week, divided into no more than six or less than five working days. The workday cannot exceed 10 hours. Special rules apply to certain jobs. The above-mentioned time limit of 45 weekly working hours is not applicable in cases such as top levels of the organisation.
- A maximum of two hours of overtime can be agreed to by the employee and employer, and the time must be paid with a 50 per cent surcharge.
- The workday must be divided in half in order to allow at least 30 minutes for lunch. This time will not be considered time worked unless otherwise stated.
- Every Sunday and holiday must be a day off, except for activities for which there is special authorisation to work on those days. Companies expressly authorised to work on Sundays and holidays must give an employee a day off in compensation for every Sunday or holiday worked and, regardless, at least two days off in the respective month must be granted on Sundays.
- Employees with more than one year in the company have the right to a paid holiday of 15 working days per year. Ten of these days must be taken consecutively, and the remaining five as agreed to by the employer and the employee. Vacations can be accumulated only for up to two consecutive years. The employer can only compensate vacation time by a cash payment when the employee resigns or is terminated without having made use of his or her vacation time.
- Pregnant women have six weeks of paid leave prior to delivery and 24 weeks of paid leave after birth (which can be extended to 30 weeks in certain cases). The employment contract remains in force, but the employer suspends payment of salary, which is paid by the health insurance company. Women's employment cannot be terminated during pregnancy nor after one year and 12 weeks after delivery.
- Except for termination-based special cases, employees cannot be dismissed while medical leave of absence, including maternity leave, is in force. The same protection is granted regarding some union authorities and health committees, etc.
- A percentage of annual profits must be distributed among employees in one of the following ways: 30 per cent of net taxable profits, with certain adjustments; or 25 per cent of the annual salary, with a maximum of 4.75 times the minimum salary per employee. The employer is free to decide which alternative to use every year.
- Severance payments include one month prior advice or payment in lieu, plus payment of one month per year of employment with the company, with a limit of 11 months and 90 UFs per month, unless a higher amount is agreed.
- An employer employing more than 20 women must have a special place where mothers can leave their children younger than two years old (or pay the expenses of day care directly to the centre chosen). Mothers breast-feeding their babies have the right to use an hour of their work shift to feed them until they are two years old.

8 What is the role of the unions in the relationship with foreign employers and employees?

The role of the unions is the same, regardless of whether the employer is a Chilean national or foreign. According to article 14 of our Civil Code, Chilean law is mandatory for all the inhabitants of the country, including foreigners, and according to article 1 of the Labour Code, relationships between employers (regardless of their nationality) and employees are governed by its rules and complementary laws, within which are those regulating unions. Their role or purpose is listed in an

unrestricted manner in article 220 of the Labour Code, which could be summarised in general terms as the representation and defence of the professional and economic interests of its members or affiliates before the employer, courts, government agencies, pension or health and other workers' organisations. One of its most important aims is to represent their members in cases of collective bargaining, whose principal purpose is to agree on common working conditions. The agreed terms give rise to a collective agreement whose validity may not be less than two years or more than four.

9 Do employees have the right to form unions? Is it mandatory for employers to honour this?

Article 212 of the Labour Code grants employees working in the private sector and government agencies the right to create, without prior authorisation, any unions they deem appropriate. Consequently, the employer is obliged to accept and respect them. In any case, a minimum quorum of members is required to create unions in a company, depending on the number of employees of said company. Companies with more than 50 employees require a minimum of 25 members, who represent at least a 10 per cent of the total number of employees. If there are less than 50 employees, a minimum of eight members is required. If there is no union in the company, one may be created with at least eight members, but it must comply with the aforesaid quorum within a maximum period of one year. However, 250 or more employees may always create a union, regardless of the percentage that said number represents within the total number of company's employees. There may be more than one union in a company. Article 19 of the Constitution and article 214 of the Labour Code establish the freedom to join and to be a member of a union. This implies freedom to join or leave a union whenever the employee deems appropriate. No one can be forced to join a union, perform a job or develop an activity against his or her will. Employment cannot be conditional on membership or non-membership of a union. An employee cannot belong to more than one union for the same job.

10 May unions be an independent party to a labour controversy in your jurisdiction? What are their rights and duties towards the employer and unionised employees?

Unions may represent their members in the exercise of their individual rights if the respective member requests it. Even without prior request, it can represent them in the exercise of the rights arising from collective contracts and collective agreements or claim contractual or legal infringements that affect the majority of the members. They may also report to administrative and legal authorities the violations of labour or social security laws, and act as a party in lawsuits or administrative complaints to report unfair or anti-union practices. The union has the obligation to negotiate common working conditions with the employer through collective regulated or informal negotiations and represent the collective rights of its members, regardless of other obligations set forth in its statutes and not prohibited by law. It has the obligation both towards the employees and the employer to respect freedom of affiliation and disaffiliation. It has the obligation to act in a loyal manner towards the employer. The Law includes some actions that are considered unfair practices of the employee or unions.

11 May a union request, bring about or cause a stoppage? If so, in what cases and what remedies would be available to the employer?

The union may only call a strike within a regulated process of collective bargaining, once the period set by the law has expired (depending on whether there is a previous collective agreement still in force or not), and only if no agreement has been reached with the employer. The strike must be approved by an absolute majority of the workers involved in the negotiation and made effective at the beginning of the third day after its approval. Otherwise the last offer made by the employer is considered as accepted. It is understood that the strike has not been effective if more than half of the employees involved in the negotiation go to work. The strike may not be voted on if the collective bargaining is subject to mandatory arbitration or if the parties have agreed to submit themselves to said arbitration process. Furthermore, it has to be considered that employees of companies of certain sectors provided by law may not declare a strike, and their collective bargaining is subject to mandatory arbitration. In July of each year, the Ministries of Labour and Social Security, National Defense and Economy decide by joint resolution which companies are to be considered in such sectors. Once the strike has been declared and made effective, if it affects more than 50 per cent of the company's employees or means the stoppage of activities essential for its operation, the employer may declare its total or partial temporary lock-out or closure. Under certain circumstances, and subject to compliance with certain requirements, the employer may hire replacement staff from the first day or the fifteenth day of the strike, as the case may be.

12 Which legislation governs the enforcement of international relationships or labour agreements provided for in international business contracts, and in international commercial proceedings, to be performed within your jurisdiction?

Any business contract or agreement, international relationships or labour agreements, even for international business contracts, are to be ruled by Chilean law and enforced in Chile if the services will be rendered in Chile. If the employee is Chilean but the employer is foreign and services are rendered abroad, they can be ruled by foreign laws and enforced in the agreed jurisdiction. The problem arises when foreign judgments of any kind need to be executed in Chile or regarding assets located in Chile. In this case, a previous process of recognition before the Chilean Supreme Court is needed, which is known as exequatur (recognition of foreign judgments). Such recognition is not granted if, for example, judgment is against Chilean law or contrary to Chilean jurisdiction (as, for example, if the matter should have been ruled by local laws and courts according to Chilean law), if the judgment is not final or if the parts have not been duly notified. After its recognition, the judgment can be executed according to local laws. Nevertheless, execution regarding assets located in Chile is usually more difficult and sometimes denied based on the rules that goods located in Chile are subject to Chilean law and thus foreign judgment involving assets located in Chile will be considered as against local laws.

13 Which international treaties or conventions are applicable to labour or employment relations in your jurisdiction? Has your country made any reservations to or denounced any treaties of the International Labour Organization?

In Chile, the conduction of international affairs is the exclusive responsibility of the president of the republic. The role assigned to Congress in this matter is to approve or reject international treaties that have been negotiated and signed by the president, and they have to be approved by Congress and published in the Official Gazette to enter into force. The processing to which an international treaty is subject to in Chile is the same applied to the processing of a bill. The Chilean state has signed a large number of international conventions regulating labour matters. Some of the most important ones are the following:

- Covenant 87 and 98 of the OIT regarding union affiliation freedom;
- the Convention on Compensation for Occupational Accidents of Rural Workers (1921), ratified on 15 September 1925 and enacted by DL 469 of 10 August 1925, published in the Official Gazette on 13 August 1925;
- Convention 87 on Freedom of Association and Protection of the Right to Form Unions (1948), ratified on 1 February 1999 and enacted by Decree 227 of 17 February 1999 and published in the Official Gazette on 12 May 1999; and
- Convention 131 on Minimum Wage Fixing (1970), ratified on 13 September 1999, enacted by Supreme Decree on 26 April 2000, and published in the Official Gazette on 29 July 2000, among others.

14 Are arbitration agreements to resolve labour or employment disputes valid and enforceable in your jurisdiction? Is there any legislation in your jurisdiction governing the private arbitrability of labour or employment disputes? May controversies in labour or employment matters in your jurisdiction be resolved through private arbitration (in your jurisdiction or abroad), or in foreign courts?

In Chile, labour controversies cannot be resolved by private arbitration. Only Labour Courts are competent to resolve labour disputes.

15 Does the law require that labour or employment proceedings be held in a specific jurisdiction or place or require that proceedings be carried out in a specific language?

According to article 423 of the Chilean Labour Code, the judge with jurisdiction to hear a labour lawsuit is the judge of the defendant's address or of the place where the services are or have been provided, at the option of the plaintiff, without prejudice to what is set forth by special laws. As Spanish is the official language of Chile, every procedure held before Chilean courts must be in Spanish.

16 Is there a concept in your jurisdiction providing for class-lawsuit in labour or employment matters? Does your law allow the consolidation of multiple labour or employment proceedings? Are human rights related grievances admissible in labour and employment proceedings?

Our legislation does not consider class actions in labour matters. However, if several workers are in a similar situation with their employer and claim the same rights, they may all file their lawsuits in the same trial or request the accumulation before the same court of causes that were initiated individually. Article 485 establishes a special procedure to protect employees' constitutional rights, imposing fines to the employer in case of breach.

17 Can foreign lawyers serve as counsel in labour or employment proceedings in your jurisdiction? If so, can they do so alone or must a local lawyer serve as co-counsel? Are their fees subject to local taxation?

Only lawyers with a professional title granted or recognised by the Supreme Court have locus standi and can act in Courts as attorneys or counsellors in labour matters in Chile. All documentation must be in Spanish, so full command of the Spanish language is necessary. Income tax is applicable to all services rendered in Chile.

18 Are labour or employment awards issued by foreign courts or arbitration courts recognised and enforced in your jurisdiction?

Labour or employment awards issued by foreign courts or arbitration courts would not be recognised and enforced in Chile as labour matters are subject exclusively to local courts and Chilean courts. Arbitration or foreign judgments are not accepted and thus recognition would be denied by the Supreme Court as described in question 12.

19 May labour courts or boards grant interim relief? If so, how is that relief enforced? Does it apply to assets located abroad? Are these valid against unions?

According to article 444 of the Chilean Labour Code, in the exercise of his or her precautionary function, the judge shall order all actions he deems necessary to ensure the outcome of the intended action, the protection of a right and the singling out of the obligors' assets in terms sufficient to meet the claimed amount. The precautionary measures ordered by the judge should be proportionate to the significance of the lawsuit. Precautionary measures may be ordered at any stage of the processing of the case, even if the claim has not been answered or even before it has been filed, as pre-trial measures. The merits of the case and the need for the right that is being claimed must always be reasonably proved. This does not apply to assets located abroad, except through the appliance of exequatur in order to execute a court's ruling abroad. Such measures could also be applied against unions fulfilling the aforesaid requisites.

20 Can labour courts or boards issue orders, subpoenas or use other legal processes to compel the production of evidence by a third party or compel a third-party witness to appear before them? If so, will a court of law lend its aid in enforcing such an order against a recalcitrant third party?

According to the Labour Code, the court may order the presentation of documents in the hearing. Likewise, if, without any good cause, the documents which should have been presented by one of the parties are not presented, the allegations made by the other party regarding the evidence may be considered as proven. If the deponent does not appear at the hearing without good cause, refuses to testify or gives evasive answers,

the allegations of the other party regarding the evidence may be considered effective in a claim or defence, as appropriate.

21 Can a party to a labour proceeding seek relief from the court or board? What is the scope of such relief?

In the exercise of his or her precautionary function, the judge shall order all actions he or she deems necessary to ensure the outcome of the intended action, as also the protection of a right and the identification of the obligors and their assets in terms sufficient to meet the claimed amount.

22 Are the resolutions issued by a labour court or board final? What are the remedies available for the parties?

Appeals may only be filed against interlocutory sentences putting an end to a lawsuit or making it impossible to continue, concerning protective measures. However, as a general rule, the only possible remedy against a final sentence in labour matters is the Appeal for Annulment, if there are any of the grounds for it listed in question 25 below. Only in very exceptional cases may the remedy of unification of jurisprudence before the Supreme Court be used, for example, if there are grounds such as the one listed in question 23.

23 What are the grounds for challenging an award and what is the period of time a party has to challenge that award?

In the case of final decisions, the only remedy available is the appeal for annulment, if during the process or in the final decision Constitutional rights or guarantees have been infringed, or if the decision has been issued infringing a law which significantly influences the ruling on the case. The deadline for filing this Appeal for Annulment is 10 days. Exceptionally, an appeal of unification of jurisprudence may be filed before the Supreme Court if there are different interpretations of the Courts of Justice regarding the subject matter of the trial. The deadline for filing this appeal is 15 days.

24 If a party files a lawsuit in violation of an agreement to arbitrate, will a petition by the defendant to remit the lawsuit to arbitration be granted by the labour courts or boards in normal circumstances or is the right to sue not waivable? If so, will that petition be treated as a threshold matter or will it be rolled into the merits of the litigation such that the defendant will also need to defend the merits of the lawsuit in court?

As explained before, private arbitration is not accepted by Chilean labour law, hence labour courts will not accept suit where these kinds of requests are being claimed. Also, according to article 5, paragraph 2 of the Labour Code, labour rights cannot be waived as long as the labour relation is in force.

25 Does the law provide that post-award interest accrues on an unpaid award?

Yes, the Chilean Labour Code establishes that if an award is issued by a court, the plaintiff is entitled to obtain not only the condemned amount but also the interest accrued.

26 Can a foreign award be enforced if the award has been set aside by the courts?

According to the Chilean Labour Law, any dispute concerning labour relations must be solved before Chilean Courts. Hence it is not possible to enforce any award issued by foreign courts related to labour matters.

27 Are employment agreements for definite periods or seasonal jobs valid?

Chilean Labour Law allows employment contracts for definite periods or seasonal jobs. Notwithstanding, according to number 4 of article 159 of the Labour Code, if the employee is not dismissed when the term established in the contract expires, the labour relationship is considered to be of indefinite duration. Also, if the employment contract – subject to definite duration – is renewed more than two non-consecutive times within a period of 12 months, or is renewed two consecutive times in any period of time, the labour relationship is considered to be of indefinite duration. The duration of fixed-term contract may not exceed one year, but in the case of managers or people who have a professional or technical degree, such duration can be extended to two years.

Also, transitional or seasonal jobs are allowed and especially regulated as work that is momentary, temporary or fleeting, which must be determined in each particular case. Chilean Labour law contemplates special regulation for seasonal farm workers.

Similarly, Chilean labour law allows part-time contracts corresponding to the contract in which the weekly working period cannot exceed 30 hours.

28 Does the law allow probationary or initial training periods? If so, how long may they last?

Probationary employment contracts do not exist in Chilean Labour Law. Notwithstanding, as stated in question 27 above, labour contracts subject to definite duration are allowed. Also, bear in mind that definite duration contracts may not exceed one year, except for contracts of managers or people who have a professional or technical degree.

According to paragraph 3 of article 8 of the Labour Code, services can be provided by students or graduates of college or middle school for a certain time in order to comply with the requirements of professional practice. Notwithstanding, such situation does not create a labour relation.

29 Are employees hired under any of the foregoing modalities entitled to all labour benefits and social security?

Employees hired under definite duration contracts are entitled to the same labour benefits as indefinite contract employees. The main difference strives in the possibility of the employer to terminate the employment contract, without severance compensations, when the term established in the contract expires. Bear in mind that Chilean Labour law contemplates maternity and union protection, so the employee cannot be dismissed without a court's authorisation. Also, consider services rendered by practice students, as stated above.

30 Is outsourcing lawful? Are there special rules or penalties associated with it?

Outsourcing is permitted by Chilean Labour Law. It is extensively regulated by articles 183 A to 183 AE (introduced by Act 20,123), which establish especial rules for outsourcing companies and temporary services companies. There are no specific limitations for services that can be outsourced. Consequently, out¬sourcing will depend on the work, tasks or services the company will act as principal, meet needs and wants to outsource. Our labour legislation provides two types of responsibilities for the main company, vicarious liability and joint liability. The difference between them is that vicarious liability occurs only when the principal company exercises the rights and withholding information regarding their contractors or subcontractors as applicable, instead of joint liability occurs in the context of the parent company does not exercise those rights. It is important to consider that no subordination or dependency may exist between the sub¬contractor's employees rendering the services and the principal company, otherwise such employees could be considered as directly hired by the principal company and hence its employees.

31 Are restrictive covenants, such as non-compete and non-solicitation undertakings lawful and enforceable?

Covenants such as non-compete and non-solicitation agreements can be enforced as long as they are included in the corresponding labour contract or its amendments, hence providing grounds to the employer to terminate the labour relationship invoking material breach of the same contract, if the employee fails to comply with the aforesaid obligations. Regarding the lawfulness of such clauses, their limitation is provided by the Chilean constitution, which in its article 19 number 16 recognises and protects the freedom to work. This means that a non-compete clause can never be interpreted nor intended to limit in any way the freedom of any given employee to resign to his or her current job, or apply to a new one.

It also means that, as long as a non-compete clause is not included in the corresponding labour contract or its amendments, then such obligation cannot by enforced towards the employee.

The scope of such non-compete clauses must be restrained to a determined area or commercial sector, specifically the employer's business. If not, the clause could be considered as violating the employee's labour freedom and declared null and void.

Non-solicitation agreements are regulated, towards the employer, within antitrust regulations.

32 In brief, what advice do you have with respect to labour or employment relationships and agreements for a foreign lawyer advising a foreign client contemplating entering into a business deal with a company from your jurisdiction? What are the red flags?

In this respect, it should be considered that any enterprising investment must have in mind the analysis of labour aspects by a local specialist consultancy, in order to comply with regulations, make use of the existing benefits and successfully deal with the country's practices. It is worth noting that Chilean labour legislation has been conceived as a manner to protect what has been judged as the weaker part of the labour relationship, that is to say, the employee. Also, it is important to consider that labour law is governed for what is known as the 'principle of reality', by which, more than legal designations or considerations, the reality of practice shall prevail at the moment of judging a practical situation. In fact, many legal figures which seem to be appropriate and lawful according to civil law are in fact questionable from the labour law perspective. These and other elements must be taken into consideration when running a business in Chile.

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Was born on February 19, 1964. He studied law at the Law School of the University of Chile, receiving the highest mark, and obtained his law degree in 1988. He also attended the Negotiation Workshop held at the Harvard University Law School, 1997. Coauthor of "Aspectos Fundamentales de los Actos Jurídico Procesales y su Nulidad" (Fundamentals of Legal Procedural Acts and their Annulment, 1988). Professor of Law at the Police Science Academy since 1992. Recognition by the International Who's Who of Professionals Historical Society; Madison Who's Who Registry of Executives and Professionals 2009-2010; Lawyer Monthly as Leading Lawyer 100 (2011) and by the publication The Best Lawyers in America 2009 and 2010.

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