International Labour and Employment Compliance Handbook

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Labour and Employment Compliance in Chile

International Bar Association

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Sixth Edition

Gerardo Otero A.
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About the International Labour and Employment Compliance Handbook

From 1976 through 1988, the International Bar Association and Kluwer Law International published the groundbreaking International Handbook on Contracts of Employment. This Handbook provided one of the first global overviews of the law of the international employment relationship.

Since publishing the first edition, globalization of business has created an increased demand for knowledge of labor and employment laws throughout the world. Therefore, along with Kluwer, we decided to publish an updated Handbook which we have titled the International Labour and Employment Compliance Handbook.

This new Handbook was intended to be a practical guide by providing a general overview of key labor and employment issues in multiple jurisdictions. Each chapter was written so that it is easy to understand by lawyers and non-lawyers alike. Each country author has also followed a standard outline to assist readers in analysing employment issues in each country.

The first edition of this new Handbook included nineteen (19) different countries.

This Handbook would not have been possible without the help and assistance of many people. Most importantly, the individual country authors are all distinguished legal practitioners who spent considerable time drafting and revising their country reports to meet difficult deadlines. We thank each of them. Our friends at Kluwer, especially Ewa Szkatula, have done a wonderful job in keeping the editors and the authors on schedule. Finally,we want to also express our gratitude to Cuatrecasas, Gonçalves Pereira, and Baker & McKenzie LLP for their valuable assistance in the coordination and organization of this project. Our warmest thanks to each of them.

Because of the success of the Handbook,Wolters Kluwer Law & Business decided to publish each country report also as a separate book to give a choice in obtaining the information. We hope this new format will be a helpful and useful resource just like the Handbook. Both formats are available in print and online.

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March 2013

Chile

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1. LEGAL FRAMEWORK: EMPLOYMENT LAW

Labour law in Chile is basically contained in the Labour Code, which regulates relations between employers and employees. Unless ordered by express rule, the Code is not applicable to employees working for the State (whether centralized or decentralized agencies), for the Legislature or the Judiciary, or to any public employee subject to special rules (but only to the extent indicated by those special rules).

As a general overview, it is important to bear in mind that rights contained in the labour laws cannot be waived while the employment contract remains in force. Thus, each employee is entitled to certain minimum inalienable rights, and any attempt to waive such rights of the employee is prohibited and unenforceable. Those rights can be complemented by additional rights and benefits granted by the employer in the labour agreement, its exhibits, or later modifications.

Article 3 of the Labour Code, defines the subjects of labour relations: employer and employee. It indicates that the employer is any natural or legal entity who uses the intellectual or material services of one or more persons under an employment contract. Employee is any person who renders intellectual or material services as a dependant or subordinated to an employer, under an employment contract.

As the definitions show, subordination and dependency are the basic aspects that determine whether a relationship must be treated under labour law or as an Independent Contractor.

In this respect, it must be taken into consideration that any investment must consider the analysis of the labour aspects by specialists, in order to comply with local regulations, make use of the existing benefits, and successfully deal with the country's practices, considering, for instance, some of the following aspects: Labour law is governed by what is known as 'Principle of Reality',

which means that the judge will consider the real and practical facts or situations of a case when judging, more than the mere legal considerations, so the reality of practice shall prevail. In fact, many legal figures which seem to be appropriate and lawful from a civil law perspective may be in fact questionable from the labour law one. Also, it is important to bear in mind that Labour Courts have the tendency to judge in favour of employees, applying the '*Pro Operario*' principle, due to the idea that employees are the weakest part in an employment relationship.

Article 3 of the Labour Code also provides a legal concept of Company. In this sense, Company is defined (from an employment point of view) as any organization of personal, material and immaterial assets, organized under the direction of an employer to achieve economic, cultural, social or charitable goals, endowed with a certain legal individuality.

As per the amendment Act 20,760 dated 7 July 2914, the aforesaid concept of Company was modified in order to include new criteria: two or more companies shall be treated as a single employer if they have a common labour direction and between them exists a similitude or complementarity of the provided products or services, or, if they have the same controller.

The amendment also establishes that the mere fact of ownership of such companies by a common controller is not a sufficient condition by itself to set forth the existence of a holding according to the terms set forth in the preceding paragraph.

2. EMPLOYMENT CONTRACTS

2.1. Overview

According to Article 7 of the Labour Code, the individual employment contract is an agreement by which the employer and employee are mutually obliged, the latter to render personal services as a dependant and subordinate, and the former to pay a determinate salary for such services.

In general terms, the labour agreement can be agreed upon as indefinite, for a fixed period of time, or for a certain work or service. In any case, basic general terms and conditions must be included in the agreement and the law makes some specific requirements as it will be explained below.

2.2. Written Employment Contracts

Article 9 of Labour Code states that the employment contract can be made verbally or in writing. Notwithstanding, a written counterpart must always be signed within fifteen days after the employee starts to work, or five days

if the contract is for certain work or service, or if the employee is hired for a specific job that will take less than thirty days.

Article 10 of the law specifically describes the basic information that the contract should contain, such as date and place of the contract, identification of the parties, including the employee's nationality and date of birth, nature of the job, place where services must be carried out, salary and payment terms, work day, term of the contract and other pacts agreed by the parties.

2.3. Oral Contracts

Article 8 of Labour Code stipulates that rendering services under subordination and dependency create an employment contract beyond the presence of a written agreement.

In case of the absence of a written contract, the terms and conditions of the labour relationship shall be determined by the employee's declaration, and the authorities can also apply a fine against the employer. Therefore, even if it is not an existence requirement, written Labour Contract is of the essence and thus the law even describes a procedure that the employer must follow in order to avoid fines in case the employee rejects to sign the Labour Contract.

2.4. Employee Handbooks

According to the provisions of Article 153 of the Labour Code, the employer with ten or more hired permanent employees has the obligation to draw up an Internal Rule Code of Order, Hygiene, and Safety.

The employer shall establish the aforementioned rules according to its needs, but must compulsorily cover the particular matters listed in Article 154 of the Labour Code: times at which work begins and ends; shifts and breaks; types of remuneration; the place, date and time of salaries' payment; employees obligations and prohibitions; the appointment of an executive or dependent to whom employees can address their requests, complaints, questions and suggestions; the special rules regarding different kinds of work according to employees' age and sex; necessary adjustments and support to enable disabled employees to carry out his/her services properly; the manner to check compliance with the social security payments; compulsory military service; identity card identification and, in the case of underage persons, compliance with schooling duties; rules and instructions about hazard prevention, health and safety to be observed in the company premises; applicable sanctions for violation of the obligations set forth in the internal regulations (which may consist only in verbal or written warning and a fine of up to 25% of the daily salary); the procedure for application of the sanctions referred to above; the

procedure, measures and sanctions to be applied in cases of sexual harassment complaints; procedures in case of mobbing; procedures intended to control alcohol and other drugs abuse; and finally, the procedure applicable in case of claims for violation of the principle of remuneration equality between men and women who carry out equal functions.

Any other subjects on regulations deemed necessary by the employer to guarantee a safe working environment might be included in the Internal Rule.

Issues related to employee's health and safety, regarding the employer's obligation to inform possible hazards, must be covered according to the nature of each activity, such as proper use and care of personnel protective equipment, rules and instructions for using of tools and working items, measures to avoid occupational disease and accidents, sun care, prohibitions to operate certain machinery or equipment or to intervene them without authorization, etc.

In terms of implementation, Internal Rule Codes must be published for thirty days at two places in company premises, so as to give employees the opportunity to read it and make comments. After that, a copy of the Internal Rule Codes must be sent to the Health Minister and Labour Authority within five days from the date on which it has entered into force. In addition, the employer must provide the employees with a free copy of such document.

2.5. Job Descriptions

Article 10 of Labour Code expressly requires that each labour agreement includes a description of the type and nature of the tasks to be executed by the employee. Labour Authority has clarified this requirement, indicating that it must clearly and precisely describe the job and services to be carried out by the employee. It does not mean a detailed description of every task and function, but it implies a general and complete description including main responsibilities to be covered by the position.

In practical terms, a complete job description is also important for the company in order to be able to demand compliance and claim a breach of the obligations stated in the contract as just cause for dismissal. This description will be also important to determine whether or not a redefinition of duties is considered an internal replacement of workers in case of a strike. Worker replacements are forbidden during a strike according to the amendment of the Labour Law contained in Law 20,940 dated 8 September 2016 and in force as of April 2017.

2.6. Offer Letters

In Chile, there is no special regulation for offer letters, and there is no compulsory requirement to sign them. However, it is important to consider that the terms offered to the candidate, and accepted by him/her, are binding to the employer

unless such terms and conditions are mutually modified afterwards at the moment of signing the labour agreement.

2.7. Checklist of Do's and Don'ts

– Enter into a written agreement on time according to deadlines given by Chilean legislation (fifteen or five days, depending on the employment contract duration).
– Beyond legal stipulation for a labour agreement, have in mind that clauses regarding confidentiality, non-compete and non-collective bargaining are recommended depending on the employee's position. Be careful regarding the stipulations included in the labour agreement, because it is not possible for the employers to modify them unilaterally.

3. RECRUITING, INTERVIEWING, SCREENING AND HIRING EMPLOYEES

3.1. Overview

Analysis of the screening procedures, documents or questions must be done considering that Chilean Constitution forbids any kind of discrimination which is not based exclusively on capacity or personal aptitude of the candidate for the required position.

In this sense, Article 2 of Labour Code expressly states that any kind of discrimination is a contravention of labour rules and principles. According to law, discrimination means 'any unfair distinctions based on race, sex, colour, age, marital status, union membership, religion, political ideas, nationality, socioeconomic status, language, beliefs, participation in guild organizations, sexual orientation, gender, filiation, personal aspect, illness or incapacity or social origin'.

Therefore, no employer can condition the hiring of an employee to those circumstances which may mean or imply discrimination. However, distinctions, exclusions or preferences based on personal qualifications or aptitude of the candidate required for a specific job will not be considered as discrimination.

3.2. Recruiting

Usually, employers recruit new employees through advertisements in newspapers, by a direct search or headhunting.

There is no express regulation regarding recruitment except for the above-mentioned rules relating to non-discrimination. Job offers that require any of the above-mentioned conditions may be considered as discrimination acts.

3.3. Employment Application

There is no express regulation regarding employment applications. However, rules relating to non-discrimination must be observed.

The requirement for a criminal record certificate can only operate in cases of jobs for which it is absolutely necessary to hire a person with no criminal record, as part of the suitability and personal capacities for the specific job (only legitimate and constitutionally authorized criteria to be considered in hiring workers). In addition, only the candidate is allowed, in those cases, to self-disclose his/her criminal history on the job application.

It is not advisable to ask for candidate's photographs, because, in case it is not able to prove other circumstances that support non-hiring, it can be considered as discrimination of physical appearance. Photographs are allowed if they are required exclusively for identification purposes.

In addition, employers are allowed to verify references provided by the job applicant.

3.4. Pre-employment Inquiries

There is no express regulation about pre-employment inquiries except for the mentioned rules relating to non-discrimination. References may be necessary, as well as resume information on studies and previous work experience.

3.5. Pre-employment Tests and Examinations

It is possible to have medical examinations for candidates in case a particular health condition is required for the position to be filled.

Even though psychological examinations are not compulsory, they are frequently required so as to verify suitability for the position.

3.6. Background, Reference and Credit Checks

According to Article 2 paragraph 6 of the Chilean Labour Code, the employer cannot condition a hiring to the absence of economic, financial, bank or commercial debts or records, unless the employee will be granted power of attorney to act on behalf of the employer involving at least general managing powers, or if he/she is going to be in charge of collecting, administrating or safekeeping funds or valuables of any nature.

References can be required, and also curriculum vitae containing information about studies and previous work experience. Employers may require and check references provided by the job candidate.

3.7. Interviewing

There is no express regulation regarding job interviews, except for the need to avoid questions that may imply discrimination.

3.8. Hiring Procedures

There is no specific regulation about this matter, so the employer is free to conduct its hiring process according to its internal policies and to the extent permitted by applicable law as long as it is not considered as discriminatory against the applicant.

3.9. Fine and Penalties

There are no special fines and penalties for breaching pre-contractual obligations beyond what has been indicated above. In case of discrimination, it is possible to claim the corresponding damages before an Ordinary Court.

3.10. Checklist of Do's and Don'ts

- Do not require/ask in an interview process about matters which may imply discrimination, as for instance, sexual orientation, eventual pregnancy, political tendencies and religious beliefs, among others.
- Do not require economic, financial, banking or commercial background unless the employee is going to have representation faculties to act on behalf of the employer (involving at least general managing powers); or he/she is going to be in charge of collecting, administrating or safekeeping funds or valuables of any nature.
- Personal Data must be used only for the purpose for which they have been collected, unless they come, or they have collected it from publicly accessible sources.

4. MANAGING PERFORMANCE/CONDUCT

4.1. Overview

Under Chilean legislation, poor performance is not considered a breach of contract', neither a fault nor a cause for termination, unless it implies an actual breach of specific obligations agreed in the corresponding Labour

Contract or breach of obligations consubstantial to the specific job according to its nature.

It is assumed that it is the employer's obligation to train the employees so they are able to perform their work in the best possible way, allowing them to assist in training sessions, the cost of which must be borne by the company.

Nevertheless, if the Company has performance bonus and a formal evaluation process clearly informed, including the parameters to be measured, the performance can be evaluated and the employer could condition the bonus or its amount to the evaluation's results. In any case, such evaluation should be clearly stated and based mostly on objective and quantifiable parameters.

Also, if the Labour Contract clearly states the employee's obligations, the material breach of those is a just cause for termination. In case of conflict, the Courts are to decide whether the seriousness of the contract breach entitles the employer to terminate the contract or not (according to Article 160 No. 7 of the Chilean Labour Code).

4.2. Coaching and Counselling

There is no formal process required nor the employer is subject to obligations in this area.

4.3. Written Evaluations

There is no need for written evaluations. Notwithstanding, any measurement – if the employer decides to apply them – should be mostly based on objective and quantifiable parameters which are to be previously known by the employee and informed to him/her in advance. It is also important to consider that parameters should be provable in court if the employee files a claim against such evaluation and its effects.

4.4. Warning and Suspensions

The employer must state, in the employee handbook (Internal Rules Code), which conducts are prohibited in the company and the possible measures to be applied by the company in case of breach of such rules, such as written notices, suspension and even termination in serious and reiterated cases.

Also, each Labour Contract should clearly state the employee's obligations and prohibitions according to his/her position.

Nevertheless, as stated before, poor performance cannot be considered as a fault or *per se* as a breach of contract and therefore be subjected to termination,

unless it implies material breach of obligations and prohibitions contained in the Labour Contract.

4.5. Checklist of Do's and Don'ts

- Parameters and issues to be measured should be mostly objective, quantifiable and probable in Court.
- Existence of an evaluation process for purposes of determining payment of performance bonus should be clearly stated and duly informed to employees.
- Obligations to be complied by the employee must be clearly stated.
- Termination or sanctions for poor performance are not possible unless it implies material breach of obligations contained in the Labour Contract.

5. TERMINATION OF EMPLOYEES FOR PERFORMANCE OR DISCIPLINARY REASONS

5.1. Overview

Employment stability is a governing principle in Chile, and the general rule is that employment relationships have an indefinite duration, unless otherwise stated.

Under Chilean law, dismissal must be based on any of the causes stated in the law. Hence, the employment contract may be terminated only on (any of) the grounds set forth in the Labour Code, and the employee shall be entitled to receive severance payment depending upon the reason for termination. Termination may be executed based on fair causes (certain specific breaches incurred by the employee) which do not imply any severance payment for the employee or based on company needs which must be real, verifiable and clearly informed. In this case, severance payment is mandatory.

Termination for no cause is only possible in the case of managers with powers of attorney to represent the company with general administrative powers; employees hired in an exclusive reliance status of the employer according to their contract obligations; and, in the case of employees hired for home services.

Poor performance cannot be argued unless it implies material breach of obligations or prohibitions arising from the Labour Contract.

5.2. Separation and Severance Payment

According to the law, the employment contract can end by mutual agreement, resignation or death of the employee, expiration of the term agreed in the contract, the conclusion of the task or work for which he/she was hired, and

by acts of God. In these cases, there is no severance pay and the employer must only pay the outstanding accrued benefits. These are the non-guilt causes of termination.

In addition, the employer may, unilaterally and without expressing any reason, terminate the contracts of executive and senior officers who have power of attorney to act on behalf of the company with at least the above mentioned powers, or those acting in an exclusive reliance status. Also, the employer can terminate employees because of company needs. Such needs shall be specifically informed in the dismissal letter and set the ground for litigation in case the employee considers the cause argued for the termination is not applicable or fair. In both cases, the employee is entitled to a severance payment.

In any of these cases:

(a) A formal notice shall be given to the employee not less than thirty days in advance unless compensation in lieu of such notice is paid (equivalent to the last monthly salary earned by the employee). The letter needs to contain all the causes for dismissal and the facts in which such cause is supported, as the causes and facts contained therein set the ground for discussion in court. No other reasons or facts can be argued later.

(b) The employee is entitled to a severance pay if the contract has been in force for a year or more, equivalent to thirty days of the last salary earned by the employee for each year of service or fraction over six months, with a cap of 330 days (eleven years of services). The salary used as a base for this calculation is limited by law to 90 Unidades de Fomento per month (CLF 90 = USD 3,480 = CLP 2,380,000 approximately depending on daily exchange rates). The employer may always agree on paying the severance payment based on the real salary earned by the employee and/or with no years of service cap, but it is not mandatory unless there is a formal written agreement in such sense. In case the employer exceeds these limits without being obliged to do so, IRS could reject such expenses.

The severance payment is compatible with the compensation paid in lieu of the formal notice that the employer must give to the employee, mentioned above in letter (a) and equivalent to the last monthly salary earned by the employee.

Also, the law considers some additional causes for terminating the contract without severance payment, such as proven serious misconduct due to dishonesty in the execution of the work; slander against the employer and immoral behaviour that affects the company where he or she works; material breach of contract or obligations, among others. The argued cause must be specifically detailed in the termination letter and the employer must have strong documentation or proofs to support such facts in case the employee argues against the cause used for dismissal.

Any final settlement must be signed and ratified by the employee before a faith minister which is usually a Public Notary. Such documents ratified before the Notary Public or Labour Authority is the only document that finally settles and terminates the labour relationship.

The severance must be paid at the moment the settlement is signed. If the parties agree on a payment in instalments, such payment must include interests and readjustments and the said settlement cannot be authenticated by a Notary Public but only by a Labour Inspector.

5.3. Fines and Penalties

Article 168 of the Chilean Labour Code states that if the cause argued as cause for termination by the employer in the formal letter of dismissal is considered unfair or inapplicable, the employee has sixty days to file a suit against his/her employer. In such a case, if no agreement is reached, as a first step the employee is entitled to claim to labour authorities who can summon both parties in order to reach an agreement. The employee is always entitled to directly file a suit with Labour Courts. If the court accepts the employee's claim, the severance payment can be increased by 30% to 100%, depending on the argued cause considered unfair or inapplicable.

If the Court deems that the dismissal has violated the employee's fundamental constitutional rights, the employer might be obliged to pay an additional fine equivalent to an amount of six to eleven months' salary. If the dismissal is considered as seriously discriminatory, the employee may choose to either be reinstated to his/her job or claim the fines and legal compensations. According to the new law mentioned above, if the dismissal is considered an anti-union conduct, the dismissal will produce no effect.

5.4. Checklist of Do's and Don'ts

- Dismissal process is very complex and mistakes are very risky as facts argued set ground for litigation and additionally, fines and sanctions might be applied. Thus, we strongly recommend discussing the matter with a local attorney before proceeding, and also have the dismissal letter prepared by attorneys, based on the facts informed to them, but bearing in mind that the information and causes argued need to be complete, accurate, real and provable in court. No further causes or supporting facts can be argued later.
- Also, we suggest that written offers, emails or any written correspondence always contain exclusively the amounts required to be paid by law or contract.

Offers of additional amounts must be informal, as otherwise they become an acquired right even if the settlement is not signed. Thus, additional amounts to be offered in order to reach an agreement should only be in form written in the final settlement to be signed before the Notary Public.

6. LAYOFFS, REDUCTIONS IN FORCE, AND/OR REDUNDANCIES AS A RESULT OF JOB ELIMINATIONS OR OTHER RESTRUCTURING

6.1. Overview

As stated above, employment stability is a governing principle in Chilean Employment Law and most of the employment relationships are of an indefinite duration. Therefore, in general terms, the employer can only argue a legal cause for dismissal. Only legal causes are applicable.

6.2. Reductions in Force, Layoffs/Job Eliminations

Reductions in force, layoffs or job eliminations are not by themselves legal causes for dismissal. The generic cause applicable to such cases would be *company needs*, based on any of the mentioned reasons, which in any case should also be supported by facts, results of the company, business plans, or any other related situations. Such facts, reasons, and situations need to be clearly stated in the dismissal letter and should be provable in a court if the employee files a claim. In that case, the court is to decide whether the grounds of the dismissal really justify the termination of the contract or not.

6.3. Fines and Penalties

Fines and penalties mentioned under section 5.3 above are applicable in these cases. Bear in mind that dismissal is a complex process and the termination letter needs to contain all the causes for dismissal and the facts by which such causes are supported, as the causes and facts contained therein set the ground for discussion before a court and no other reasons or facts can be argued later during the eventual trial.

6.4. Checklist of Do's and Don'ts

See section 5.4 above.

7. LABOUR AND EMPLOYMENT LAW RAMIFICATIONS UPON ACQUISITION OR SALE OF A BUSINESS

7.1. Overview

First of all, it is essential to distinguish between the purchase of the ownership of a company, from the purchase of certain assets or the whole business unit.

Chilean Labour Law provides specific regulation in case of total or partial amendments to the company's ownership, stating the *labour continuity principle* set forth in Article 4 paragraph 2 of the Labour Code. Some authors and jurisprudence consider that the same continuity applies in case of purchase of the company's assets and debts, or of a business unit, but this could be arguable.

Such labour continuity means that the ownership changes do not affect the employee's rights and obligations arising from individual or collective contracts, which will remain in force with the new employer.

7.2. Acquisition of a Business

Acquisition of a business does not necessarily mean a change in the company's ownership unless in fact it is a purchase of shares or rights or it is the real purchase of the whole business unit, rights, and liabilities and not only its assets.

If it is an acquisition of business in terms that labour continuity is not applicable, the transfer of employees from seller to buyer is not just a matter of law and will require the employee's express consent. If the purchaser is not willing to accept and recognize all the benefits already accrued (pending vacations, years of antiquity, etc.), it could request the seller to previously terminate its employees, who could then be hired by the purchaser with no pending rights nor obligations because the latter would be considered as a completely new and different employer.

In such case, the purchaser should agree with the employer and the employee on the terms of such termination and/or transition of the employee to the new company, as this does not occur *automatically*. Thus, the corresponding assignment of the Labour Contract should be agreed to in writing by the three parties, stating specifically the applicable rules regarding pending vacations, accrued years of work, benefits, etc. If any changes are needed in order to unify labour rights, salaries, benefits, etc. the employee should accept the changes in writing.

If such an assignment is not agreed upon, the employees would remain under seller's payroll and so, it would continue being responsible for all labour obligations.

If the purchase can be considered as a change in the company's ownership, then the company continues being the employer and the labour rights and

obligations would not be affected. The assignment is *as it is* and thus, any changes required in order to unify labour rights, salaries, benefits, etc. cannot be decided unilaterally by the employer but need the employee's acceptance of the change. Otherwise, individual and collective contracts remain unchanged with the new owners, who cannot modify such conditions unilaterally (*continuity principle*).

Determination should be conservative, and it is advisable to agree on the assignments of the Labour Contract with the employees when possible and in cases when the situation is not clear, to avoid any risks or new situations not considered in the purchase agreement.

Therefore, in all purchase agreements, it is essential to confirm which party will bear the costs for termination and settlements with the employees who do not accept to be transferred, in case the labour continuity principle is not applicable.

Also, related to this matter, we deem important to confirm who will bear eventual costs for termination of contracts with companies that provide personnel to the sold company or who render services to its clients, as some labour law contingencies can be triggered relating to said employees in case the purchaser maintains such contracts.

7.3. Acquisition Checklist

- It is essential to analyse if the acquisition is of a business means or a change in the company's ownership.
- It should be discussed if the employees would be assigned, previously terminated and/or hired as new employees by the purchaser or if they remain as seller's employees.
- Labour contracts should be updated with any new conditions agreed upon. This is not necessary if labour continuity applies.
- A thorough due diligence is needed to be sure which labour contingencies are assumed by the purchaser.

7.4. Sale of a Business

Applicable rules are the same as stated above except for the fact that if there is neither an assignment agreement nor application of labour continuity, the seller remains as the employer and thus is subjected to all labour obligations; except this is the main business, in which case labour continuity could be argued and the enforceability of the employment contract regarding the buyer.

Sale of business could be argued as valid reason to support company needs for dismissal, but the employer should pay the corresponding severance payments and other pending benefits.

7.5. Sale Checklist

Same as in case of an acquisition, as stated in section 7.3 above.

8. USE OF ALTERNATIVE WORKFORCES: INDEPENDENT CONTRACTORS, CONTRACT EMPLOYEES, AND TEMPORARY OR LEASED WORKERS

8.1. Overview

In this matter, it is necessary to previously distinguish between two situations: (1) an Independent Contractor rendering services; (2) an Independent Contractor rendering services at its own expense and risk and at client's premises, work, or operation.

In the first case, the relationship is regulated by civil or commercial law; the second is known as Subcontracting, which beyond civil and commercial implications also produce labour effects, because labour law imposes responsibilities on the Principal (client), so as to protect employees of the Contractor rendering services. Hence in this figure, there will be three parties: The Principal Company, the Contractor or Subcontractor, and the employee.

However, it is necessary to consider that in case of Subcontracting, there should not be any subordination and/or dependency relationship between such Principal and the Contractor's personnel. In consequence, the object of the service to hire the Contractor is a work or service, which does not involve the provision of permanent personnel to fulfil positions or functions into the Principal Company. Otherwise, according to reality principle, there is no real service but a labour relationship between the Principal and Contractor's personnel, simulated through a third party.

8.2. Independent Contractors

8.2.1. Definition

According to Article 183 A of the Labour Code, Independent Contractor under a Subcontracting relationship must be defined considering the subcontracting concept, which is:

> *the activity performed under an employment contract by an employee for an employer, denominated contractor or subcontractor, when the latter, by reason of a contractual agreement, executes works or services at its own*

expense and risk and with employees under its dependency, for a third natural person or legal entity that is the owner of the works, company or operation, denominated Principal, where the services are provided or the contracted works are executed.

In case of services different from Subcontracting, Independent Contractor will be the company or person who renders civil or commercial services to another company or person, without dependency and/or subordination and without additional labour responsibilities for the Principal (client).

8.2.2. Creating a Relationship

The relationship between Independent Contractor and the company to whom services are rendered is created by means of the corresponding agreement reached by the parties which regulate the terms and conditions of the hired services (contractual agreement).

However, in case of subcontracting, the state law rules in protection of the Independent Contractor's employees, which basically impose labour responsibilities to the Principal regarding audit of labour obligations' compliance by the Independent Contractor and joint liability for those not fulfilled by the Independent Contractor towards its personnel. For details see section 8.3 below.

8.2.3. Compensation

Compensation to be paid by the Client Company to the Independent Contractor will be determined by the corresponding fee agreed by parties.

8.2.4. Other Terms and Conditions

To the extent permitted by law, parties are free to agree on the terms and conditions for hired services.

8.3. Contract Workers

As it was mentioned above, in case of subcontracting relationship, the law imposes important labour responsibilities on the Principal (client). In this sense it is necessary to consider the following:

(a) The Principal has joint and several liabilities to comply with labour obligation of employees assigned by the Independent Contractor to the execution of the services. In other words, in case of non-compliance,

the employee may require the payment due thereto indistinctly from his/her employer (Independent Contractor), and from the Principal.

(b) However, the law contemplates that, in case that the Principal exercises the rights indicated in following letters (a) and (b) below (right to information and withholding right), its liability shall be subsidiary and thus, the first obliged to pay shall be the Independent Contractor. Only if the Contractor fails to respond shall the Principal do so. At any event, the employee may subsidiarity sue the Principal in the same legal action in which he/she sues the Contractor.

In order to minimize the above-mentioned Principal's responsibilities, it must exercise the following rights granted by law:

(a) Right to Information: The Principal is entitled to require information regarding the effective compliance of the Independent Contractor's labour obligations to its personnel assigned to the execution of the contracted services (ART 183 Labour Code). For these purposes, the respective Labour Authority (Inspección del Trabajo) will issue certificates evidencing the fulfilment of such obligations, which should be required by the Principal from its Contractors.

(b) Withholding Right: In the event that the Independent Contractor does not comply with its obligations to its employees assigned to the provision of services, the Principal shall be entitled to withhold the amounts necessary to fulfil such obligations, from the price to be paid thereby to the Contractor, proceeding to the payment thereof at the corresponding social institutions (according to Article 183-C paragraph 3, of the Labour Code).

In any case, the Principal's responsibility is related to obligations generated during the provision of the services, and just in relation with legal duties, including compensations for working accidents which occur in its working place; thereby any other payments that the Independent Contractor may have agreed with its employees beyond the legal are excluded.

8.4. Leased Workers

As it was mentioned above, it is not authorized by the law to provide personnel to a company through subcontracts, as it is considered as hidden labour relationship and not as a real service, or hiring through third parties. According to that, as a general rule 'lease of personnel' is not legal in Chile.

However, the law contemplates certain exceptions which allow legal provision of personnel to a company without generating subordination or dependency with the Principal. In those cases, the law only allows contracting such services

with a company legally incorporated as Transitory Services Company, which can only provide personnel to the Principal in the following specific cases (according to Article 183 Ñ of the Labour Code):

(a) suspension of the employment contract or of the obligation to provide services, of one or more employees due to medical leaves, maternity leaves or holidays;
(b) extraordinary events such as the organization of conferences, fairs, exhibitions or other events of a similar nature;
(c) new and specific projects of the User (client), such as the construction of new facilities, additions to existing facilities or the expansion to new markets;
(d) period of start-up of activities in new companies;
(e) occasional, whether or not periodic, or extraordinary increases in the activities of a given section, operation or premises of the User; or
(f) urgent, specific and impossible to postpone works that require immediate execution, such as repairs in the facilities and services of the User.

In the case indicated in (a) above, the contract shall last the absence period of the replaced employee due to the suspension of the contract or the obligation of providing services, depending on the case.

In cases indicated in (b) and (e) above, the employment contract to provide such services shall not exceed ninety days. In case of (c) and (d) above, said period shall be for no more than 180 days. No renewal is allowed in any of these cases.

However, if the contracts are agreed for less than the 90 or 180 days respectively and the circumstances that motivated their execution prevail upon the termination thereof, the contracts may be extended but only until completing the 90 or 180 days, as the case may be.

If the employee continues working after the expiration of the term (90 or 180 days depending on the case), his/her contract becomes indefinite, and the Principal is to be considered as his/her employer.

The provision for employees of temporary services shall be recorded in writing: indicating the grounds invoked for contracting a temporary service according to Article 183 Ñ of Labour Code, the jobs for which such contract is entered into, the duration thereof, and the agreed price; and indicate whether the employees provided shall or shall not be entitled to use the collective transportation and facilities of the company. The identification of the parties shall include the name, domicile and identity card or tax registration number of them. In case of corporations, such identification shall additionally include the legal representative(s).

The lack of a written agreement will exclude the company hiring the services from the application of the exceptional regulations provided for temporary

services, and the employee shall then be deemed to be a dependent of such company. Finally, it is necessary to indicate that temporary services cannot be contracted in the following cases (according to Article 183 P of the Labour Code).

(a) to carry out tasks which entail the right to represent the company, such as manager, assistant manager, agent or attorney;
(b) to replace employees who have called a legal strike in the respective collective bargaining process; or
(c) to assign employees to other temporary services companies.

8.5. Checklist of Do's and Don'ts

– Carefully determine cases where the relationship must be treated as subcontracting.
– In case of subcontracting, Principal must exercise its rights of information and withholding so as to minimize its eventual labour responsibility towards Independent Contractor' s personnel rendering the hired services. Also, Principal shall not give direct instructions to the Contractor's employees.
– As it was previously mentioned, in case of temporary services, bear in mind cases where the agreement is permitted (because it is an exception), the authorized duration for such agreement, and the cases where temporary services are forbidden.

9. OBLIGATION TO BARGAIN COLLECTIVELY WITH TRADE UNIONS: EMPLOYEES' RIGHT TO STRIKE AND A COMPANY'S RIGHT TO CONTINUE BUSINESS OPERATIONS

9.1. Overview of Unions' Right to Organize

Article 212 of the Labour Code grants employees from the private sector and government agencies the right to create, without prior authorization, the unions they deem appropriate and 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 fifty employees require a minimum of twenty five members representing at least 10% of the total number of employees. If there are less than fifty employees, a minimum of eight members is required which must represent at least a 50% of the total employees. If there is no union in the company, one may be created with at least eight members but it has to comply with the required quorum within a maximum period of one year.

However, 250 or more employees may always create a union, regardless of the percentage the said number represents of the total number of employees in the company. There may be more than one union in a company, but each employee can only be a member of one of them.

The role or purpose of the unions is listed in an unrestricted manner in Article 220 of the Labour Code, which could be summarized 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 and/or health and other employees' organizations.

One of its most important aims is to represent their members in cases of collective bargaining, in which, the principal purpose is to agree on matters of common interest of the parties that could affect their relationship, common working and salary conditions. The agreed terms give rise to a collective agreement whose validity may not be less than two years and not more than three.

9.2. Right of Employees to Join Unions

Article 19 No. 16 of the Constitution and Article 214 of the Labour Code establish the freedom to be a member of a union. This implies freedom to join, not join, or leave a union whenever it is deemed appropriate. No one can be forced to join a union to perform a job or develop an activity. 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.

9.3. How Employees Select Unions

The employee is free to select which Union of the Company he/she wants to join. According to Article 214 of Labour Code, the '*affiliation to a Union is voluntary, personal and not delegable*'.

Notwithstanding the above, each Union may set in its own bylaws the membership requirements and the rights and obligations of its members. Among the obligations is the obligation to pay Union fees.

Also, the union must incorporate in its own bylaws a mechanism to ensure that the board is composed, in not less than one-third of the total number of its members, by women.

9.4. Pre-election Campaigning

Under Article 237 of the Labour Code, in the first election of the board, all employees attending the constituent assembly and meeting the requirements established in its bylaws to become union director, may be candidates.

Nominations for the next elections must be submitted in the form for the term and publicity stated in the Union's bylaws. In case no rules in this regard are established in the bylaws, applications must be submitted in writing to the secretary of the board between fifteen and two days prior to the date of the election.

Those obtaining the highest number of votes are elected. In case of a tie, the instructions of the bylaws must be complied with and if nothing is stated in them to this effect, a new election must take place only between among those candidates with tied results.

Unions with fewer than twenty five members may only have one Director who acts as chairman. In other cases, they may have the number of directors set in their respective bylaws, but with a limit of from three to nine directors, according to the number of members, who will enjoy the privileges and immunities the law holds for them (according to Article 235 of the Labour Code).

9.5. Unfair Labour Practices

Our legislation provides a general rule applicable to all contracts, including employment contracts, under which they must be fulfilled in good faith and therefore, bind the parties not only to what is stated in them but also to all that which comes from the nature of the obligation or pertaining to it by law or custom (according to Article 1546 of the Chilean Civil Code).

As a consequence, the relationship between employee and employer must be based on mutual trust and loyalty. That is why our Labour Code does not sanction conducts considered unfair, like those that violate freedom of association and those that interfere with collective bargaining and its procedures, whether those were committed by the employer, the employee or the union.

These conducts are punishable by a fine, which amount will depend on the severity of such conduct, without prejudice to the criminal penalties that may take place if the conduct constitutes a criminal offence.

If the anti-union conduct involves the dismissal of an employee, in addition to the fines that may be applicable, the employee may demand his reinstatement with payment of benefits for the time that he has been separated from his/her duties or the payment of compensation provided by law and such termination will produce no effect.

The Labour Authority maintains a register of employers who have been convicted for unfair anti-union and/or unfair collective bargaining practices, and it publishes – every six months – the list of infringing companies and unions. Companies convicted of anti-union or unfair collective bargaining practices cannot enter into agreements with public entities for two years.

9.6. Relocation of Work/Shutdown of Business

The Union has the obligation to negotiate common working and salary conditions, and any matters of common interest with the employer, through regulated collective or informal negotiations, and represent the collective rights of its members, regardless of other obligations set forth in its bylaws and not prohibited by law.

According to the new rules recently in force, the frame of time required since the company's incorporation in order to allow its employees – collective bargaining will depend on its size. For micro and small companies, it will be of eighteen months since incorporation, for mid-size it is twelve months and for big ones it is six months, and the collective agreements cannot last less than two and not more than three years.

The Union may only call a strike if, within a regulated process of collective bargaining, no agreement has been reached with the employer during the period set by the law (depending on whether there is a previous collective agreement still in force or not). Notwithstanding, there are some judgments that have accepted as a rightful strike agreed by employees out of a regulated collective bargain process. The strike must be approved by an absolute majority of the employees involved in the negotiation and made effective at the beginning of the fifth 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 the said arbitration. Furthermore, it has to be considered that employees of companies that are in certain situations provided by law may not declare a strike and their collective bargaining is subject to mandatory arbitration. In July, after every two years, the Ministries of Labour and Social Security, National Defense and Economy qualify by joint resolution, the companies that are in the said situation.

Once the strike has been declared and made effective, if it affects more than 50% of the company's employees or means the stoppage of activities essential for its operation, the employer may declare its total or partial temporary lockout or closure.

Worker replacement (internal or external) during the strike is forbidden (Article 345 Labour Code).

During the strike or lockout, the labour relation is suspended and the – neither the employee is obligated to work nor the employer is obligated to pay the salary and other benefits for such nonwork days.

An impasse in collective bargaining can be submitted to mediation or arbitration if the parties decide to do so in order to try to reach an agreement.

9.7. Checklist of Do's and Don'ts

- Do not perform any act aimed at preventing the creation of a union or discourage membership to it.
- Do not perform acts to hinder collective bargaining or the negotiating ability of the union.
- Be prepared to face an eventual strike within a process of regulated collective bargaining.

10. WORKING CONDITIONS: HOURS OF WORK AND PAYMENT OF WAGES – BY STATUTE OR COLLECTIVE AGREEMENTS

10.1. Overview of Wage and Hours Laws

According to Article 41 of the Labour Code, wage or salary is any sum of money or goods appraisable in money that the employee receives for his/her work, excluding meal, transportation and travel allowances, family benefits, and others. Also, wages can be fixed or variable, calculated on the basis of time or productivity, paid in cash in full or partly in goods. Article 42 of the Labour Code establishes that the concept of wage includes salary, overtime payments, commissions, and profit share.

Article 22 of the Labour Code establishes a general maximum work week of forty five hours that cannot be divided into less than five or more than six days. A work day cannot exceed ten hours. Nevertheless, the employer may agree with the union who represents at least 30% of the company employers a different distribution of the weekly working hours.

Special rules apply to certain jobs such as crew on fishing ships that do not involve continuous work during the day, or drivers.

The above mentioned time limit is not applicable to top levels of the organization, such as vice presidents, managers, executives, administrators and others, who render similar services or work without direct superior supervision. Also, salesman employees who work outside the company premises can be excluded from workweek limitations.

10.2. Minimum Wage

Although the amount of salary is freely determined by the parties, the monthly salary that is agreed upon in the employment contract cannot be lower than the minimum salary established yearly by law. This year, the minimum salary amounts

to CLP 276,000 per month, equivalent to approximately USD 456 per month. The wages for part-time jobs cannot be lower than the minimum applicable, calculated proportional to the normal workday.

Also, a percentage of the company's annual profits must be distributed among employees in one of the following ways: (1) with the 30% of net taxable profits of the company, with certain adjustments; or (2) with the 25% of the employee's annual salary, with a maximum of 4.75 minimum salaries per employee. The employer is free to decide which alternative to use every year.

The parties can also agree to additional benefits, which may or may not be imputed towards the above mentioned legal benefits. But, according to the principle of reality explained in the Introduction, if an additional benefit is usually or regularly paid to the employees it could be considered by a court that such benefit is an acquired right, even though is not expressly considered in the employment contract.

10.3. Overtime

A maximum of two hours per day of overtime can be agreed upon, and that time must be paid with a 50% surcharge. The agreement must be in writing and in force for no longer than three months. The purpose must be solely to attend to temporary and specific needs of the company.

The above-mentioned overtime is not applicable to top levels of the Company's organization, such as vice presidents, managers, executives, administrators and others, who render similar services or work without direct superior supervision. Also, salesmen employees who work outside the company premises can be excluded from overtime payments.

10.4. Meal and Rest Periods

The work day must be divided in two in order to allow at least 30 minutes for lunch. This time will neither be considered nor compensated as work time, except if the employee remains at the employer's disposal and must comply with the employer's instructions. An established practice or a collective bargaining agreement can however provide for the payment of breaks and their inclusion in the calculation of effective working time.

10.5. Deductions from Wages

Employees must finance their retirement pension through the contribution of 11.14%–11.54% of their monthly salary. Men may retire at the age of 65 years and women at the age of 60 years. Contributions are made to pension

funds managed by private entities (AFP), subject to control by government superintendence.

Death and disability pensions are financed with retirement funds and insurance plans. These contributions are paid to the same pension fund to which retirement contributions are paid.

Regarding health benefits, employees may choose between a public health system, financed by a contribution of 7% of the employee's salary, or a private system under which the employee affiliates to a private health insurance company (ISAPRE). The minimum contribution is similar to that of the public health system.

All these social security benefits are to be withheld by the employer from employees' salary and paid to the corresponding entities. Such contributions are tax deductible for employees' income and are calculated against a salary that is limited to 78.3 CLF (approximately USD 3,495). This is the minimum but the employee can agree to deposit a higher amount.

Work accident and occupational disease benefits are financed by employers through a basic contribution equivalent to 0.93%, plus an additional contribution depending on the accident rate of the company, of monthly salaries.

Expatriates who have a professional or technical degree may obtain a waiver of social security contributions, provided they are enrolled abroad in a social security system that provides benefits at least similar to those existing in Chile (sickness, old age, disability and death). The exemption does not include work accident insurance or health contributions. In order to be benefited by the exemption or withdraw the pension funds deposited during their time worked in Chile, together with special clauses to be contained in the contract, the foreign employees must provide legalized and officially translated copies of their professional or technical degree and of the original certificate granted by the foreign pension system stating their date of affiliation and granted benefits, including a special mention to the four benefits described above.

The contributions for which the employer and employee are responsible shall be paid to the Corporate Manager of the Insurance by the employer. As a general rule, this payment shall be made within the first ten days of the month following the month when the income or subsidy is due.

Any other deductions, such as loans payments provided by the employer to the employee, needs a written agreement by the employee.

10.6. GARNISHMENT

According to Article 1618 of the Civil Code and Article 445 of the Chilean Civil Procedural Code, salaries are protected against garnishment by the employee's creditors.

However, for debts that come from court-ordered child support and such, the Court could garnish up to 50% of benefits and salaries received by the

obligor (employee). Such garnishment, if duly notified, must be withheld by the employer and directly paid as instructed by the court.

10.7. Exemptions to Wage and Hour Laws

Special rules apply to wage and working hours for special jobs such as crew on fishing ships that do not involve continuous work during the day, or drivers.

Also, daily or weekly limitations to working hours and overtime rules are not applicable to top levels of the organization, such as vice presidents, managers, executives, administrators, and others, who render similar services or work without direct superior supervision.

Wages for part-time jobs cannot be lower than the minimum applicable, calculated proportional to the normal workday.

10.8. Child Labour

Any person older than 18 years of age can sign any type of employment contract. No authorization is required.

Between the ages of 15 and 18, an employee needs his parents' authorization to work with a maximum of 30 hours per month. Persons between the ages of 15 and 18 can work only if they have the above mentioned authorization, during the schoolwork or after finishing it and provided it is light work that does not affect their health. Child labour below 15 years of age is forbidden.

Also, individuals under the age of 18 can neither work in cabarets or places where alcoholic beverages are sold nor work at night or have a work placement in drinking establishments. In addition, individuals under the age of 18 cannot be employed in certain hazardous activities.

10.9. Recordkeeping Requirements

In this point, it is very important to bear in mind that Article 5 of the Labour Code expressly states that employers can exercise their rights within the limits imposed by the Constitution, especially regarding respect of privacy.

In Chile, protection of Personal Data is regulated by Law 19,628. According to its rules, the processing of Personal Data can only be done, when it is authorized by law or is expressly authorized by the holder of the data that in this case would be the employee. Such authorization is not required if the data comes from public records, or when the data are commercial, financial, banking or economic; or when it is contained in listings that only mention activity,

profession, education and degrees, address and date of birth. The aforesaid authorization is not required if the company needs the data for internal reasons not be disclosed to third parties. Also, the law requires employers to protect Personal Data from improper disclosure. Personal Data must be used only for the purposes for which they have been collected.

When the consent is a requirement, the authorization granted by the holder for the treatment of his Personal Data must be express (precise, clear); informed (the person or employee that gives its consent shall properly be informed with respect to the intention of the storage and their possible communication to the public); and it must be made in writing. The authorization can be revoked, although without retroactive effect. Such revocation will have to also be made in writing.

It is important to bear in mind that Chile is in the process of adapting its framework on the protection of Personal Data and to ensure cross-border data flows fulfilling the international standards in the OECD and the EU.

10.9.1. Information that Must Be Maintained

According to Chilean Labour Law on Article 33 of the Labour Code and the requirements of Chilean Labour Authorities, the employer has to keep a record of the hours worked each day, daily working time and overtime, days of sickness and periods of vacation. Furthermore, according to Article 9 of the mentioned Code, the employer is obliged to keep payroll information including the name and home address of the employee, date of birth, sex, occupation, agreed work and agreed hours of work.

With regard to the payroll, the employer has to keep relevant internal information, such as agreed salary, hours worked, health insurance and fees.

Also, working hours of each employee must be calculated daily, by recording, using any means, the starting and finishing hours of each working period or by keeping a record of the number of hours worked.

In this sense, the employer has to inform the Labour Authorities about any termination and it has to maintain the necessary information from the employees.

Any person may process Personal Data, provided it is done in a manner consistent with The Privacy Act and for purposes permitted by law. In any case, said process must respect the full exercise of fundamental rights of the holders of said data and the powers that The Privacy Act recognizes. It is very important to bear in mind that the Labour Code expressly states that employers can exercise their rights within the limits imposed by the Constitution, especially regarding respect of privacy. Personal Data must be used only for the purpose for which they have been collected unless they come or they have collected from publicly accessible sources.

10.9.2. Records that Must Be Retained

The employer must keep files with the data and information of its employees such as employment contracts, receipts for payment of salaries and pension contributions and vacations, daily working time and overtime, days of sickness and periods of vacation, among others. The law allows such information to be kept by the employer within the central premises of the company.

Although specific law does not establish a determined retention period for the aforesaid documents, the employer should keep certain documents for a prudential period of time (five years since the contract termination at least) to be used as proof in case of contingencies regarding termination, such as settlement agreements, social security payments certificates and wages payment receipts signed by the employees.

According to The Privacy Act, Personal Data must be erased or deleted when their storage lacks a legal basis or when they have expired. Personal Data must be used only for the purpose for which they have been collected, unless they come, or they have collected from publicly accessible sources. They must be modified when they are incorrect, inaccurate, misleading or incomplete. Personal Data whose accuracy cannot be established or whose validity is questionable and for which no cancellation is applicable must be blocked. The controller of Personal Database will proceed to remove, modify or block the data, if any, without the holder's request being necessary.

10.9.3. Failure to Maintain Required Records

If the employer fails to keep records as explained above, it could result in the appliance of fines by the Labour Authorities and in a lack of proof in case of a lawsuit.

Furthermore, according to the Privacy Act, the controller of the Personal Data record or database may establish an automated process of transmission, provided the holders' rights are protected and the transmission is relevant to the tasks and goals of the participating agencies.

When a request for Personal Data is made through an electronic web, the following should be recorded: (a) the identification of the applicant; (b) the reason and purpose of the request, and (c) the kind of data that are transmitted. The admissibility of the request shall be evaluated by the database controller that receives it, but the liability for such a request will be of the person making it. The recipient may only use Personal Data for the purposes for which the transmission was made. This article shall not apply in the case of Personal Data accessible to the general public.

10.10. Reductions in Compensation Caused by Economic Downturn

In Chile, there is no legal cause as Economic Downturn that could entitle the employer to reduce employees' wages or compensation.

Notwithstanding the aforesaid, according to Article 161 of the Labour Code, the employer is entitled to dismiss employees arguing the legal cause called *Business Needs*, based on an economic or financial restructuration in order to obtain significant costs savings, need to reduce costs or restructure, etc.

In such case, the employer must proceed as follows: (1) A thirty-day termination notice must be given to the employees, notifying also the Labour Authorities. Otherwise, compensation must be paid in lieu of such notice (equivalent to one month salary with a cap of 90 Unidades de Fomento, or approximately USD 4,017). (2) Also, in case that employment contract has been in force for one year or more, the employee is entitled to a severance payment which as a general rule is the equivalent to one month of salary per year of services or fraction over six months. The salary used in this calculation is also limited by law to CLF 90 monthly and with a cap of eleven years of services to be indemnified.

10.11. Checklist of Do's and Don'ts

- Is very important that employee's assistance is kept in a special record. This is important in order to demonstrate overtime. Also, it is very important to keep track of absences.
- When negotiating a Labour Contract, it is important to make clear if the amounts agreed are gross or net prior to the signature of the contract.
- In case of dismissal based on Business Needs, it is very important to describe the grounds of the cause invoked, as such facts will determine the basis for the defence in case a claim is filed by the employee before a court.
- It is crucial that the social security benefits withheld by the employer from employees' salary are properly paid to the corresponding entities in due time. Otherwise, it could result in very serious penalties, even criminal and the nullity of an eventual dismissal.

11. OTHER WORKING CONDITIONS AND BENEFITS: BY STATUTE, COLLECTIVE AGREEMENTS OR COMPANY POLICY

11.1. Health and Other Insurance

Regarding health benefits, employees may choose between a public health system, financed by a contribution of 7% of the employee's salary, or a private system under which the employee affiliates to a private health insurance company (ISAPRE). The minimum contribution is similar to that of the public health system.

Unemployment

Since October 2002, Chile has an unemployment insurance system. This insurance establishes benefits for employees who lose their jobs, and it is financed by the employee, by the employer and by the Government.

An employee whose employment contract has been terminated has the right to receive compensation financed with the amount accrued in his individual account. He or she will be entitled to receive extra compensation from the Unemployment Solidarity Fund whenever the compensation obtained from his individual account is insufficient, pursuant to Article 25 of the 19,728 Act.

Employees must meet the following requirements to be entitled to compensation from the Individual Account:

(1) The employment contract must have been terminated for the reasons established in Articles 159, 160 or 161 of the Labour Code or by indirect dismissal pursuant to Article 171 of same Code.
(4) The employee must register at least twelve monthly contributions in his Individual Account, whether continuous or discontinuous.

The unemployment insurance does not apply to: (1) employees working in private homes; (2) employees hired under an apprenticeship agreement; (3) employees under 18 years of age; (4) independent employees; and (5) retired employees receiving a total disability or retirement pension.

The employer must communicate the commencement or termination of the employee's services to the Corporation Manager of the Unemployment Insurance within fifteen days of the occurrence. A breach of this duty will be fined.

The insurance has a tripartite funding comprised of the following: (1) the employee must contribute 0.6% of his taxable income; (2) the employer must contribute 2.4% of the employee's taxable income; and (3) the Government will contribute an annual amount.

Contributions are calculated on the basis of the taxable income of the employee, with a maximum of CLF 117.54 (approximately USD 5,245).

Job disability

Whenever the employee has a temporary authorized Leave of Absence due to work accidents or occupational diseases, the employees are entitled to receive their remunerations from the health insurance company funded by the employer through a contribution equivalent to 0.93% of monthly salary.

Extinguishment of the obligations

The period to demand payment of the unpaid contributions is five years as of the day that the labour relationship ended.

11.2. Pension and Retirement Benefits

Employees must finance their retirement pension through the contribution of 10% of their monthly salary. Men may retire at the age of 65 years and women at the age of 60 years. Contributions are made to pension funds managed by private entities (AFP), subject to control by government superintendence.

Death and disability pensions are financed with retirement funds and insurance plans. These contributions are paid to the same pension fund to which retirement contributions are made.

As mentioned above, although financing is obtained from a withholding of employee's salary, the employer is obliged to timely pay such contributions to the corresponding entities.

11.3. Vacation and Holiday Payments on Termination

Employees with more than one year in the company have the right to a paid holiday of fifteen working days per year. Ten of these days must be taken consecutively, and the remaining five as agreed by the parties. Vacations can be accumulated only for up to two consecutive years and are not compensable in money while the employment contract is in force. The employer can only compensate vacation time by a cash payment when the employee resigns or is terminated without having made use of his vacation time.

At termination, pending vacations have to be paid to the employee, considering for such calculation that for each year of services the employee is entitled to fifteen days of vacations (fifteen working days, plus the non-working days in between).

Proportional vacations are the vacations to which an employee is entitled, starting from the date of his/her contract (in case Labour Contract lasts less than a year) or anniversary contract, to the termination date. Pending vacations include any other period pending.

In order to calculate pending vacations, the following procedure must be applied: 1.25 days must be considered for each month worked (15 days/12 months = 1.25). Therefore, per each full worked month the employee is entitled to 1.25 days for vacations, or the corresponding proportion in case the last month was not completely worked. The resulting days must be paid considering the amount of the daily salary (monthly salary/30 = daily salary). Finally, bear in mind that to the total days to be indemnified for pending vacations, you must add payment for Saturdays, Sundays and holidays included from the termination date to the end of the days resulting as pending vacations.

11.4. Leaves of Absence

11.4.1. Personal Leave

The Labour Code does not provide special personal leaves to allow the employee, for example, to attend medical appointments or other personal arrangements, except for working women over 40 years of age and working men over 50 years of age who are entitled to use half working day per year for specific medical exams, such as mammography and prostate exam, being able to include in such time any other preventive exams. Such permission must be requested at least one week in advance.

Therefore, the employer is not obliged to grant them leave except in the specifically mentioned cases, where the employee must provide the certificates that prove that the exams were done on the agreed date. Nevertheless, nothing prevents the parties to the employment relationship to freely agree personal leaves, as established by Article 32 of the Labour Code, which allows the compensation of time used for personal leaves establishing that such compensations shall not be considered as overtime, provided that such compensation and leave solicitude had been requested in writing by the employee and authorized by the employer.

11.4.2. Medical or Sick Leave

In case of illness or accident, the employee is entitled to a paid leave for the period indicated in the corresponding medical certificate. In such cases, the employment contract remains in force, but the employer suspends payment of salary and the employee instead receives compensation from the health insurance company, not covering the first three days unless the leave lasts more than ten days.

Except for termination based on one of the special causes established in Article 159 or 160 of the Labour Code, employees cannot be terminated while the Leave of Absence is in force.

11.4.3. Bereavement Leave

In accordance with the provisions of Article 66 of the Labour Code, the employee is entitled to three days of paid leave – in addition to annual holiday – in case of death of his/her father or mother. This leave must be applied since the date the respective death and cannot be compensated in money by the employer. The same leave is to be applied in case of death of the employee's unborn child.

In case of death of an employee's child, spouse or civil partner, the employee is entitled to seven days paid leave, in addition to the annual holiday. This leave must be given from the date of death and cannot be compensated in money. It should be pointed out that in these cases the employee has the privilege of immunity for a month since the date of death. Nevertheless, if the employee is hired for a specific job or for a specific term, the immunity will be in force only until the expiration of the job or term agreed in the labour contract.

11.4.4. Marriage Leave

According to Article 207*bis* of the Labour Code, in case of marriage or civil union, every employee is entitled to five consecutive days of paid leave, which can be used at the day of marriage or union, or immediately before or after it. It must be requested at least thirty days in advance and within thirty days since the marriage, the employee must file the corresponding certificate issued by the Civil Register.

11.4.5. Family Leave

Chilean Labour Law does not establish any special Family Leave. Notwithstanding, according to Article 199 of the Labour Code, if a child younger than 1 year of age needs attention at home due to a serious sickness, the working mother or father has the right to request a special Leave of Absence. In order to use this

Leave of Absence, the employee has to prove the seriousness of the sickness by a medical certificate.

Also, when the health of a child under 18 years of age requires parental care because of a serious accident or illness, or the child is in the final stage terminal or serious illness, severe or likely risk of death, the working mother or father is entitled to a Leave of Absence for the number of hours equivalent to ten ordinary working days per year, distributed at their discretion, which are to be considered as worked hours for all legal purposes.

11.4.6. Pregnancy/Maternity Leave

According to Article 195 of the Labour Code, the working mother is entitled to a Leave of Absence prior to delivery and to Leave of Absence after the delivery (maternal leave). The first one consists of a Leave of Absence of six weeks before delivery. The doctor or midwife in charge of the care of the pregnant employee determines the possible date of birth, in order to calculate the starting date of the prior to delivery Leave. Maternal Leave of Absence consists of a rest period of twelve weeks after the birth. These terms may vary slightly in specific cases described in the law (early delivery, twins, etc.)

In addition, there is a Parental Leave of Absence of twelve additional weeks counted as of the expiration of the aforesaid Maternal Leave, which can be used partially by any of the parents. This additional Parental Leave of Absence has a payment subsidy ceiling of gross CLF 73.2 (approximately USD 2,930). If working mother exercises the right to work half a day, the Parental Leave of Absence is extended to eighteen additional weeks since the completion of regular Maternal Leave, with a 50% of the subsidy.

If both parents are working, either of them can enjoy the Parental Leave of Absence, according to the mother's decision, in place of the father as of its seventh week and for the number of weeks that the mother indicates. Therefore, the father may be entitled to the Parental Leave of Absence, for a maximum of six weeks if the mother chooses not to work half days, or of twelve weeks if he chooses to do so, starting from its seventh week. If the father makes use of it, he must send a registered letter to the employer with at least ten days of anticipation, informing such circumstance.

11.4.7. Maternity Leave

See section 11.4.6 above.

11.4.8. Injury at Work

See section 11.4.2 above and section 12 below.

11.5. Checklists of Do's and Don'ts

- It is crucial that social security benefits to be withheld by the employer from employees' salary are properly paid to the corresponding entities. Otherwise, it could result in very serious sanctions, even criminal penalties and need to pay salaries after termination until the pending provisional payments have been done, as termination is considered null until they are updated.
- Bear in mind that the failure of the employee in withholding/paying social security benefits will result in the annulment of termination of the labour relation by any cause. Such failure could result in fines applied by the Labour Authorities, plus payment of salaries for the time between termination and payment of such obligations. Moreover, Notary Publics will not authorize any settlement agreements which do not prove proper payment of the social security benefits.
- Regarding medical or sick leave, keep a record of the corresponding medical certificate. Clarify the reason why employees are absent from work, as absences with no fair cause may be a just cause for termination, and medical leave is fair cause of absence. Also, it is very important to keep track of absences.
- Always avoid any discrimination against an employee due to health reasons or especially because of pregnancy.

12. WORKERS' COMPENSATION

12.1. Overview

Both Law 16.744, in its Articles 76 et seq., and the Supreme Decree 109 of the Labour Ministry, in its Articles 7 et seq., establish procedures and remedies to declare an accident or sickness as a Working Accident or a Working Sickness, in order to allow the employee to require payment of insurance by the administrative entity.

In this sense, employees are protected while commuting from his home to his place of work, as far as the commute is as direct as possible. Accidents occurring during the commute of an employee whose employment contract is suspended or commutes which are not for work reasons are not covered.

The injured employee must file an application in order to get his/her injury or sickness declared as Working Accident/Sickness. Broadly speaking, the three instances of this procedure are the COMPIN, the COMERE and the Superintendence of Social Security. In these stages, the corresponding Board of occupational health doctors concludes if the employee is unfit to return to his position, determining its handicap degree. For an accident or a sickness

to be considered as Working Accident/Sickness, there must be a final and enforceable administrative decision to declare it as such.

Once this occurs, the entity administrating the insurance must compensate the employee who has suffered the Working Accident or a Working Sickness, according to the employee's degree of disability. In case of job disability, according to Article 161*bis* of the Labour Code, the employee cannot be dismissed for such reason, except if the employer pays a compensation consisting of one month remuneration for each year worked. Also, civil tort could be demanded by the employee sustained on a breach of contract obligations by the employer in order to assure a safe working place.

12.2. Checklist of Do's and Don'ts

- Employees subject to a workplace injury leave cannot be dismissed.
- Employees subject to a workplace injury leave have their employment contract suspended but they cannot be terminated.
- Company and employee must verify on time notification of workplace injury to the corresponding institutions, in order to obtain proper coverage.

13. COMPANY'S OBLIGATION TO PROVIDE SAFE AND HEALTHY WORKPLACE

13.1. Overview of Safety and Environmental Laws and Regulations

Article 184 of the Labour Code imposes upon the employer the obligation to observe health and safety standards in the workplace, to implant measures to prevent accidents, and others alike. Every company, establishment, job or economic unit, whether commercial or industrial, that has more than ten employees, needs to adopt Internal Health, Safety and Hygiene Regulations (company's Internal Code) that must set down the prohibitions and obligations imposed upon employees in regard to their jobs, permanence and life in the respective company or establishment.

Every employer must also pay special work accident and occupational disease insurance for each employee. The amount of the payment depends on the risks associated with the job and accident rate of the company. Anyway, the basic rate is 0.93% of the salary.

13.2. REQUIREMENTS

As mentioned above, according to Article 184 of the Labour Code the employer is obliged to guarantee by every means the health and safety of his employees. This means that the employer must apply the utmost diligence to assure the health and safety of the employees, so in case of injuries or working accidents of the employees, the employer will have to demonstrate that every legal measure was taken in order to prevent such accident.

According to Article 184 of the Labour Code and Law 16.744 and other applicable laws, the employee must fulfil the following requirements regarding safety standards in the workplace:

(i) The employer with more than ten permanent employees has the obligation to elaborate an Internal Health, Safety and Hygiene Regulations (company's Internal Code). In terms of implementation, the company's Internal Rules must be published for thirty days in two places of company premises, so as to give employees the opportunity to read it and make comments. After that, the Internal Ruling will enter into force and a copy must be sent to the Health Minister and other to the Labour Authority.

(ii) According to Article 66, paragraph 4 of Law 16.744 companies which employ over hundred employees will be required to constitute a Department of Prevention of Occupational Risks which will be led by an expert in prevention.

(iii) Provide their employees with protective equipment and tools necessary and in accordance with the job rendered. In any case, the employee could charge its value to the employee.

(iv) According to Decree 54, companies with more than twenty five employees must constitute a Joint Committee, composed of three representatives of the company and three employees. Its main functions are to instruct the employees on proper use of personal protective equipment, monitor compliance with health prevention and safety standards, investigate causes of accidents and occupational diseases in the company, adopt health and safety measures for the prevention of occupational hazards, and promote employees training, among others.

(v) If there are Contractors or Subcontractors' employees working at the company's workplace, an Internal Code (with Internal Health, Safety and Hygiene rules) for Subcontractors is needed.

(f) Depending on the number of employees, the Company has to hire a Risk Prevention specialist, for the number of weekly hours provided in the law in proportion to the number of employees and accident

ratio table. This cannot be outsourced, as the person in charge must be an employee.

Also, when a serious and imminent risk to the life or health of workers arises in the workplace, the employer must:

(a) Immediately inform all affected workers about the existence of said risk, as well as the measures adopted to eliminate or mitigate it;
(b) In case the risk cannot be eliminated or mitigated, adopt measures for the immediate suspension of the affected tasks and the evacuation of workers.

However, the worker will always have the right to interrupt his work and, if necessary, leave the workplace when, for reasonable reasons, he considers that continuing with them implies a serious and imminent risk to his life or health. The worker who interrupts his work must report this fact to the employer within the shortest time, who must inform the suspension to the respective Labour Inspection.

13.3. Rights of the Employees

According to Article 21 of Supreme Decree 40 of 1969, which approved the regulations on prevention of occupational hazards, the employer has an obligation to report promptly and appropriately to all its employees about the hazards of their activities, preventive policies and adequate working methods. The employer has to duly fulfil this obligation: (1) when the employee is hired; (2) when implementing a new working procedure; and (3) when changing the production processes.

Also, the employer is obliged to maintain a safe workplace, with appropriate health and environmental conditions to protect life and health of employees, whether they are direct dependents of the employee or hired by third party Contractors.

In addition, when the nature of the work compels employees to consume food in the workplace, the employer must have a room for this purpose, which must be completely isolated from work areas and any source of environmental contamination.

In any workplace where the type of activity requires a change of clothing, the employees should be provided with a fixed or mobile station where to change clothes, whose interior is to be properly clean and protected from outdoor weather conditions.

The employees are entitled to be provided by the employer with protective equipment free of charge.

13.4. Right of Employer

All employees must fulfil the preventative procedures established or obligatory in their workplace according to the company's Internal Rules.

The employer can also require the employees to use the company's machines and tools in accordance with their designated purpose and as instructed by their superiors.

In this sense, employees can be considered to have reporting duties with their employers that must be included in their labour contracts and in the company's Internal Rules. Hence, employees must inform the employer or their supervisors of any dangers to safety and health and of any errors in protective systems, and follow instructions of their supervisors and superiors.

The employer, in order to enforce the preventative procedures and to avoid responsibility in case of working accidents, may include the obligation of the employee to comply with such preventative procedures in the corresponding Labour Contract. In this scenario, the employer will be entitled to terminate the employee if there is a substantial breach of employment contract duties, depending on the circumstances, regarding the preventative procedures.

13.5. Specific Standards

See section 13.2 above.

13.6. Injury or Accident at Work

Employers must record accidents in their establishments, immediately inform them and establish a protocol to follow in response to attend to the injured employee.

13.7. Workplace Violence

Even though there are no special rules regarding workplace violence, such violence would constitute a cause for termination the Labour Contract, according to Article 160 No. 1, paragraph c), without severance pay.

13.8. Fines and Penalties

Breaches of health and safety requirements could result in fines applied by the Labour Authorities or the by Health Authorities. Fine amounts depend on the size of the company (number of employees) and the seriousness of the breach.

Also, in case of a working accident, the employee could sue the employer for not taking all possible measures to assure his/her health and safety. In this sense, the employee could claim the Courts compensation for every tort caused by the employer's negligence.

13.9. Checklists of Do's and Don'ts

- Strictly comply with any applicable health and safety rules established by the company.
- Review the applicable regulations and requirements and instal necessary safety rules and procedures.
- Keep the Internal Health, Safety and Hygiene Regulations updated according to legal regulations and requirements.
- Appoint the required specialists.
- Observe the codetermination right of the works council on the implementation of any basic regulations on health protection.
- Request your employees to comply with your health and safety standards. They may and are supposed to make their own proposals on improving safety at work.
- Request your employees to sign a receipt when any health and safety standards are given to them, including general instructions by superiors.
- In this sense, the most important objective is to take preventive measures to ensure the health and safety of employees.

14. IMMIGRATION, SECONDMENT AND FOREIGN ASSIGNMENT

14.1. Overview Laws Controlling Immigration

Chilean Immigration Laws state that tourists are forbidden from undertaking in Chile any paid activities without the corresponding permit, regardless of the place where they are effectively paid. Special working permit can be granted for foreigners under tourist visa who are hired to work temporarily in Chile, permit which is granted for thirty days and is renewable. Such work permit expires if the foreigner leaves the country and would have to be requested again at his return.

Also, working visa or temporary residence permit can be granted to foreigners who will develop paid activities in Chile for a longer period (up to one year for temporary residence and two years for working permit, renewable in both cases). A working period can be requested together with such visa or permit, and once granted allows the foreigner to work while the visa or permit is being analysed.

If a company employs more than twenty five employees, 85% of them must be Chilean. If it employs less than twenty five employees, there is no limitation. The calculation of this percentage must consider all of the company's employees in the country and exclude technical specialists. Also, an employee is considered Chilean, and thus not considered as foreign for the aforesaid calculation purposes, if he/she has a Chilean spouse or children, or is a widow or widower of a Chilean, or has lived in the country for more than five years.

Foreigners who are coming to render short-term services can remain as tourists but need to apply for the special working permit mentioned above, which needs to be requested at their arrival in Chile, accompanying the labour contract. Permits are granted for thirty days and can be renewed once; their cost is 150% of the regular visa fee.

In order to work for a longer term in Chile, foreigners require a visa subject to an employment contract, or a temporary residence permit if they have a business, personal service contract, etc. For such purposes, an application must be filed before the Department of Foreign Affairs and Immigration or at the Chilean Consulate. Ideally, they should be requested at the Chilean Consulate at least forty five days before they had planned to enter Chile (the latter is more advisable as it allows a foreigner to enter the country with the corresponding visa, obtain their ID Card almost immediately, instead of the approximately six months delay if filed locally).

Specific documentation must be attached to the application, including a work contract signed by the employer before Notary Public, a letter explaining secondment, if the case, or bylaws of the companies in which it is a partner in case it is not hired to work in Chile for a Chilean or foreign company. In any case, foreigners need to prove to the authorities that they have sufficient financial means to subsist during their stay in Chile.

Dependant visas can be requested for spouse (legally married), children and eventually parents living under their financial aid. Such relationship must be proved by means of the corresponding certificates and an affidavit stating that the applicant will assume their expenses while living in Chile is needed. Dependant visa does not allow them to develop paid work in Chile, in such case they should request one on their own.

Applications need to be filed before arriving in Chile in case they are requested at the Consulate, or before the tourist permit expires or the corresponding service starts if done in Chile.

Visa subject to a working contract can be granted for up to two years allows to work exclusively under the working contract which supported the working visa request and can be renewed for the same term, and temporary residence is granted for one year and is also renewable for such term. After one year has expired (in case of temporary residence) or two years (in case of working permits), the foreigner can also request a permanent residence, which is granted indefinitely and allows him to keep developing paid activities in Chile. One of the requisites to opt for permanent residence is not to exceed the period of 180 days outside the country during the last year of residence, and it is lost if the foreigner spent more than a year abroad and did not request an extension.

Foreigners cannot start working until the visa has been granted, or until the special working permit is stamped on his/her passport. Therefore, frequently the application includes the request of a special working permit, which is granted in a term shorter than the decision regarding the visa application and is renewable until the latter is granted. This special working permit requested together with the visa application does allow the foreigner to travel freely while the visa is processed.

Once the visa or permit has been granted, and within thirty days since such date, the employee must register his/her visa before the International Police and obtain a foreigner's identity card.

14.2. Recruiting, Screening and Hiring Process

The applicable rules are the same for foreigners and Chileans, (see section 3), except for the fact that employees need to be previously allowed to work by the corresponding visa or permit before starting to render their services.

Labour contracts for foreigners also need to include some special clauses when they are to be used to request the corresponding visas, such as the company's responsibility to comply with tax and social security obligations; declaration that the term starts after the foreigner has obtained the corresponding visa or permit; and in case of visas subject to a work contract, a travel-expenses clause stating that back home tickets in case of termination by any cause will be borne by employer.

Foreigners who have a professional or technical degree may obtain a waiver of social security contributions, provided that they are enrolled abroad in a social security system that provides benefits at least similar to those existing in Chile for disability, old age, sickness and death. For such purpose, the employee needs to provide a certificate from the social security system abroad stating the affiliation date and its benefits, plus an authorized copy of the professional or technical title (both duly legalized and officially translated if not in Spanish), and also a special stipulation needs to be agreed in labour agreement.

14.3. Obligation of Employer to Enforce Immigration Laws

It is both the employers and employee's obligation to comply with immigration laws, as sanctions and fines are considered for both of them.

14.4. Fines and Penalties

Sanctions may be classified in:

Warning: Written sanction that the migratory authorities apply to people who disobey the law, such as the exercise of remunerated activities without authorization to do so, or foreigners who extend their stay in the country after their tourism permit, other permits or visas have expired. Warnings may be applicable as long as the foreigner who is committing the infraction is not a re-offender.

Fine: It is a sanction in money that shall be paid by the foreigner committing the violation of the immigration legislation. The amounts of the fines may vary depending on the infraction committed. In the case of a natural or juridical person giving work to foreigners that are not authorized to do so, the fines may vary between one and forty minimum wages.

Expulsion: This is a sanction that establishes a mandatory order for the foreigner to leave the country when specific causes occur. In some cases, return costs of the employee obliged to return home because of immigration breaches shall be paid by the employer.

14.5. Secondment/Foreign Assignment

Secondment and foreign assignments are valid causes to support a temporary residence permit, provided the foreigner or the company requesting the permit are able to prove such situation to the authorities by means of, letters that are signed by both the local company where the foreigner will render its services and the foreign company stating the nature of the services. Salaries can be paid in Chile or abroad.

Under these circumstances, the foreign employee usually remains an employer for the company abroad, provided there is no subordination or dependence with the local company.

14.6. Checklist of Do's and Don'ts

– It is essential that employers review immigration status of foreign employers to avoid fines.

15. RESTRICTIVE COVENANTS AND PROTECTION OF TRADE SECRETS AND CONFIDENTIAL INFORMATION

15.1. Overview

As a result of the TRIPS agreements signed by Chile in the framework of WIPO, Chile introduced reforms to the Chilean Industrial Property Law in 2005. Indeed, Chile incorporated rules on trade secret protection entitled *trade secrets* in three articles which expressly incorporates this institution into our legislation (Law 19,996 amending the Industrial Property Law 19,039). Prior to this legal amendment, the decisions in this regard were given under the principles and rules on unfair competition.

15.2. The Law of Trade Secrets

Article 86 of the Chilean industrial property law defines trade secrets as follows: Business Secret means any knowledge of industrial products or processes, which the maintenance in reserve gives its holder, an improvement, advancement or competitive advantage. In addition, Article 87 of the Act establishes the grounds that constitute infringement, noting that – It is an infringement of the trade secret law the illegitimate acquisition thereof, disclosure or exploitation without the authorization of the owner and the dissemination or exploitation of trade secrets to which has legitimately had access under a non-disclosure clause, provided that the violation of confidentiality has been made with the intention of obtaining benefit or advantage by a third party or intention of harm to its owner. Article 88 provides that nevertheless the appropriate criminal responsibility, it also shall apply to the violation of trade secret, the rules stated in Title X concerning the enforcement of industrial property rights.

Therefore, the law considers the type of information that is protected. This means that it protects only the knowledge of products or industrial processes (industrial secrets), and then excludes the protection of commercial secrets. It includes not only disclosure but also acts of exploitation of information and considers several scenarios of how the information was obtained (information extraction). In addition, knowledge must be kept in confidential (although there is no mention concerning the duty to adopt reasonable steps to preserve the secret by the owner). Knowledge must have economic value, and give the holder of that knowledge, an advantage of improvement, advancement or competition. Moreover, the regulation extends to third parties and competitors and the allegedly illegal acquisition and use of the information are found to be broad enough to include those who encourage practices like merely making a profit out of a trade secret violation.

Additionally, Article 284 of the Penal Code punishes the employee or former employees: Whoever fraudulently has communicated the trade secrets of the industry from is or has been employed shall suffer the penalty of imprisonment in its medium degree or a minimum fine of UTM 1,120. The offence requires a wilful act, which can come only from a person who is or has been employed: referring only to industrial secrets (not commercial ones); referring only to duties of confidentiality by employees or former employees, does not say anything about third parties or competitors who may benefit from such conduct. Furthermore, it says nothing about sanctions or prohibitions on the use and enjoyment that these people could be made of information obtained by these means.

In addition, Law 19,223 on Cybercrime establishes a criminal offence when committed intentionally that punishes *computer espionage* that might be relevant in such instances as well. Thereby, Article 2 ° of the law sanctions the so-called computer espionage, that is, the intercept (preventing information to reach its destination), interfere (enter at reception of a signal other strange and disturbing) or access a treatment system information with the intention of taking, using or improperly disclose the information contained therein. It included in this type the interception of data in transmission and theft or copying of data.

15.3. Restrictive Covenants and Non-compete Agreements

An effective means to protect the information should be the route through the contractual duties of confidentiality and secrecy. By the principle of good faith can demand respect for confidentiality obligations implicit and explicit. The employee must use the information obtained in carrying out their duties solely to perform them. Nevertheless, one must distinguish between what constitutes a trade secret owned by the company and those competencies, skills and knowledge lawfully acquired by the employee, which constitute what is commonly referred to as work experience, for which an employee has a legitimate right to appeal to provide services to their future employers.

The Labour Authority (*Dirección del Trabajo*) in the ORD. 4731/081 dated 3 November 2010 stated that it was lawful to agree on Labour Contract confidentiality clauses, even to rule beyond the expiration of their term, as far as they respect the requirements of suitability, necessity and proportionality of the obligation. This means that at least that confidentiality lies with the knowledge of the subjects whose reserve offers an advantage to the employer with respect to their competitors. It is also a necessity to use reasonable measures to withhold such material or information. Additionally, it is a requirement of that information that is not generally known or readily accessible to persons connected with those who normally use that type of information. It is necessary to establish a Non-disclosure Agreement regarding the privacy and secrecy of the information.

15.4. Checklist of Do's and Don'ts

– It is lawful to agree on a Labour Contract confidentiality clause. It is necessary: to fulfil the requirements of suitability, necessity and proportionality of the confidential obligation, use reasonable measures to withhold such material or information, and it is necessary to set a Non-Disclosure Agreement regarding the privacy and confidentiality of the information. It is an additional requirement that such information should not be public or easily accessible to people who habitually use such information.

16. PROTECTION OF WHISTLEBLOWING CLAIMS

16.1. Overview

There is neither protection nor special regulation for whistle-blowers under Chilean Labour or Civil Law. In general terms, anyone is entitled to tell the public or someone in authority about alleged dishonest or illegal activities and to invoke non-discriminatory rules on his/her behalf (see sections 17 and 25).

In this sense, according to Article 485 of the Labour Code, any termination considered as a reprisal against an employee who has requested the control of Labour Authorities regarding labour irregularities could be subject of a *Procedimiento de Tutela* (Protection Procedure).

Also, the company's Internal Rules must include a chapter indicating procedures that the employees can follow in order to report misconduct within the company and raise claims through proper channels.

In addition, Law 20,393 of 2 December 2009 establishes and regulates the criminal liability of moral entities for the crimes of money laundering, terrorist financing, and bribery. In this sense, the company's Internal Rules must establish:

(1) Crime prevention policy of criminal liability of moral entities.
(2) Appointment of a manager of prevention.
(3) Establishment of a system of crime prevention.
(4) Monitoring and certification system of crime prevention.

16.2. Checklists of Do's and Don'ts

– Note that no measures can be taken against employees who have reported misconduct of the employer. Otherwise, it could be considered as a reprisal.

– Establish real instance for the employees to report misconducts inside the company and include them in the Internal Code.
– Duly inform the employees to use the adequate channels and procedures to report misconducts.

17. PROHIBITION OF DISCRIMINATION IN THE WORKPLACE

17.1. Overview of Anti-discrimination Laws

The Chilean Constitution forbids any form of discrimination not based on capacity or personal adaptation. Nevertheless, the law may require Chilean nationality or minimum age for specific jobs.

According to Article 2 of the Labour Code, any form of discrimination violates labour rules. Discrimination consists of distinctions, exclusions or preferences based on race, sex, colour, age, marital status, union membership, religion, political ideas, nationality, socioeconomic status, language, beliefs, participation in guild organizations, sexual orientation, gender, filiation, personal aspect, illness or incapacity, or social origin with the intention of annul or change the equality of opportunity or employment treatment.

No employer can condition the hiring of an employee to those circumstances. Nor can an employer condition the hiring of an employee to the absence of economic, financial, bank or commercial obligations unless the employee will have power of attorney to act on behalf of the employer that involves at least general managing powers, or he/she will be in charge of collecting, administrating or safekeeping funds or valuables of any nature.

Any job offer is considered discrimination and in violation of labour rules if special requirements are imposed regarding race, sex, colour, age, marital status, union membership, religion, political ideas, nationality, socioeconomic status, language, beliefs, participation in guild organizations, sexual orientation, gender, filiation, personal aspect, illness or incapacity, or social origin.

Notwithstanding, no distinction, exclusion or preference based on personal qualifications required for a specific job shall be considered as discrimination. There are some special rules that provide differences according to age, nationality, sex and others which are not considered as discrimination what will be mentioned in the following paragraphs.

The Chilean Labour Code establishes a special procedure to protect employees against any kind of breach of fundamental rights granted by the Constitution and discriminatory conducts.

17.2. Age Discrimination

For the protection of youths, some jobs or activities are forbidden for persons under 18 years of age or subject to special authorization from their parents, legal representatives or Family Judge (section 10.8).

People under 21 years of age cannot be hired for underground mining activities without a previous ability exam.

17.3. Race Discrimination

There are no special rules considering race.

17.4. Sex Discrimination/Sexual Harassment

Women cannot carry, transport, load, haul or push manually, and without mechanical aid, loads of more than 20 kg.

By express provision of Article 62*bis* of the Labour Code, the employer must comply with the principle of equal remuneration for men and women doing the same job. Differences based on skills, qualifications, suitability, responsibility or productivity are not considered arbitrary. The Internal Rules of the employer must include a procedure to submit claims which are caused by violation of this equality.

Our law considers sexual harassment as a conduct that violates the dignity of the individual. If such conduct is proven, it is cause for discharge without compensation.

The law requires that the employer's Internal Rules must include a procedure to which sexual harassment claims will be submitted, as well as protective measures and the penalties applicable in such a case. Article 211-A of the Labour Code contains the rules of a basic procedure to which the employer may refer the investigation of a sexual harassment claim.

17.5. Handicap and Disability Discrimination

On 15 June 2017, Law number 21,015 was published in the Official Gazette under the title 'Encourages the Inclusion of Persons with Disabilities to the Labor World'; a law that rather than encouraging the recruitment and inclusion of disabled people into the world of work, imposes the obligation to do so, both on the public and the private sector.

The law stipulates that in both the public administration bodies of the State (including all State powers) and companies, whether public or private, with an annual crew of one hundred or more officials or workers, at least 1% of

such annual crew must be disabled persons or beneficiaries of a disability pension under any social security scheme. Disabled persons are those who have been qualified and certified as such by the Commissions of Preventive Medicine and Disability under the Ministry of Health or the public or private institutions, recognized for these purposes by said Ministry.

The law requires for certain State organs that, under equal merit conditions, they must select preferably persons with disabilities.

In the case of the Armed Forces, Forces of Public Order and Security and Gendarmerie of Chile, the obligation mentioned in the previous paragraphs will only be applicable to their civilian personnel.

Decree No. 64 dated 1 February 2018, issued by the Ministry of Labour and Social Security established the parameters, procedures and other elements necessary to comply with the law.

In the case of the National Congress, Judicial Power, Public Prosecutor, Comptroller General of the Republic, Central Bank, Constitutional Tribunal, Armed Forces, Forces of Public Order and Security, Electoral Service, Electoral Justice and other special courts, their own bodies must dictate the necessary rules to comply with the law.

Each employer must register with the Labour Directorate the labour contracts and their modifications made for persons with disabilities or beneficiaries of disability pensions, within fifteen days of its signature and said information must remain classified.

Companies that, for justified reasons, cannot fully or partially comply with the legal obligation, must instead:

(a) enter into service contracts with companies that have contracted people with disabilities for an annual amount of not less than the equivalent of twenty four minimum monthly incomes for each disabled worker they should have hired; or

(b) make money donations to projects or programs of associations, corporations or foundations whose purpose is to directly provide services to people of limited resources or with disabilities; are incorporated in a special register prepared and maintained by the Ministry of Planning and Cooperation, and have been qualified as being of social interest by a council composed of representatives of certain State organs, the President of the Confederation of Production and Commerce, a representative of community organizations, and four prominent personalities in matters of care for people of limited resources or with disabilities, chosen by the corporations or foundations incorporated in the aforementioned registry. Donations to educational establishments that have projects for the prevention or rehabilitation of alcohol or drug addiction of students and/or parents will also be valid.

These donations must be subject to the provisions of Law 19.885 on donations, with the following exceptions:

(1) They will not give right to the tax credits and benefits considered by law, but they will have the quality of necessary expense to produce income.
(2) They should be directed to projects or programs whose social purpose includes training, rehabilitation, promotion and development for the creation of jobs, hiring, or labour insertion of persons with disabilities.
(3) They cannot be made to institutions in whose board participates the donor, his/her spouse, his/her civilian partner or ascendant or descendant relatives up to the third degree of consanguinity. If the donor is a legal entity, donations may not be made to institutions in whose board participate its partners or directors or shareholders owning 10% or more of the capital stock, or the spouses, civilian partners or ascendant or descendant relatives up to the third degree of consanguinity of said partners, directors or shareholders.
(4) The annual amount of the donations may not be less than the equivalent of twenty four minimum monthly incomes or more than twelve times the taxable maximum amount, for each worker that should have been hired.
(5) The global limit set in Article 10 of the law shall not apply to these donations.

For purposes of the donations allowed instead of the hiring of disabled employees, justified reasons will only be those derived from the nature of the functions carried out by the company or the lack of people interested in the job offers that have been made.

In any case, during the first two years of the law, companies may choose these alternative measures without the need of a justified reason.

Companies that apply any of these alternative measures must, within the month of January of each year, send an electronic communication to the Labour Directorate, with a copy each to the Undersecretariat of Social Evaluation of the Ministry of Social Development, to the National Disability Service and to the Internal Revenue Service. In such communications, the company must indicate the reason invoked and the measure taken. This communication will have a validity of twelve months.

For the above purposes, the law in question modified certain prior laws and incorporated to the Labour Code the new Article 157*bis* and 157*ter*, under a new chapter entitled 'On Labor Inclusion of Persons with Disabilities'.

The aforementioned law is enforceable for companies with 100 and up to 199 workers as of 1 April 2019, and as of 1 April 2018 for companies with

200 or more employees. Within six months from 1 April 2018, employers must register on the website of the Labour Directorate the current employment contracts of persons with disabilities or that are assignees of disability pensions under any social security scheme.

17.6. National Origin Discrimination

If a company has more than twenty five employees, 85% of them must be Chilean. If it has less than twenty five employees, there is no limitation. The calculation of this percentage must follow the rules mentioned in paragraph 14.1. and in order to work in Chile, expatriates may require visas as described in the same paragraph 14.1.

17.7. Religious Discrimination

The Privacy Act states that those data called sensitive data cannot be processed except in cases when authorized by law, or consent of the owner or there are data necessary for the determination or granting of health benefits that apply to their holders. Religion is considered as a sensitive data.

According to paragraph 1 of Article 5 of the Labour Code, the employer cannot affect the intimacy, privacy and dignity of his employees. Also, Article 154*bis* of Labour Code provides that the employer 'shall keep reserve of all information and sensitive data of the employee to have access during the employment relationship'. The Labour Authority (Dirección del Trabajo) pronounced ORD. No. 2210/035 – of 05/05/2015 regarding this matter.

17.8. Military Status Discrimination

The employee will retain his job, without payment, while doing military service or while it is part of the mobilized national reserves or is called to active duty.

However, reservists called to active duty for periods not exceeding thirty days, will be entitled to be paid by the employer the total wages for the said period unless it is expressly provided by supreme decree that they are to be paid by the State.

Military service does not interrupt the employee's seniority for all legal purposes.

The obligation of the employer to retain the employment of the employee who must fulfil his military duties shall be deemed satisfied if the employee is given another position of equal grade and payment to that previously performed provided that the employee is qualified for it.

This obligation extinguishes itself one month after the date of the respective discharge certificate and, in case of disease, proven with a medical certificate, will extend itself for a maximum period of four months.

17.9. Pregnancy Discrimination

The hiring of female employees, their retention or renewal of contract, or the promotion or mobility at work cannot be conditioned to the absence or existence of pregnancy, nor may any certificate or test be required for said purposes to verify whether the employee is pregnant or not.

In Chile, the working woman has a set of rights which are generated by the mere fact of motherhood, without requiring prior authorization or any other formality. The only requirement established by law to become a beneficiary of said protection and legal benefits is a medical certificate attesting the pregnancy and the formalities associated with a medical license for the payment of subsidies for the periods of maternity/parental leave granted by law.

A Maternity immunity protects the working woman from termination since the beginning of pregnancy until one year after the expiration of the maternal leave (twelve weeks after delivery, which means more or less two years of immunity). This immunity prevents the termination of the individual employment contract during such period, except for certain causes and with the previous approval by the Court.

There is likewise a pre and postnatal resting periods. For details see paragraph 11.4.5.

17.10. Marital Status Discrimination

There are no special rules considering marital status except that an employee is considered Chilean if he/she has a Chilean spouse and rules regarding non-discrimination.

17.11. Sexual Orientation Discrimination

There are no special rules considering sexual orientation, except for general non-discrimination rules.

17.12. Retaliation

Retaliation against employees due to or as a result of the supervision of the Labour Authority or the exercise of judicial actions is considered by our legislation as a violation of the fundamental rights of employees, who may file claims with the Labour Courts through a special procedure called *Procedimiento de Tutela* (Protection Procedure). The union to which the employee belongs may intervene in the employee's claim or may even file directly a claim before the Courts in order to protect its member. The Labour Authority may involve itself in the procedures giving rise to the complaint. Before making the complaint to the Court, the Labour Authority should conduct mediation in order to use all the possibilities of correcting the alleged conducts.

The Court may order the immediate cessation of the claimed conducts, order specific measures to repair the consequences of such conducts and apply fines.

If the retaliation has been the discharge of the employee and the judge decides so, the discharge is considered unfair and, in addition to – compensation, for lack of prior notice and severance payment with the surcharges that the law considers according to the cause of discharge, the employee shall be entitled to an additional compensation awarded by the Court equivalent to no less than six and no more than eleven months' salaries.

17.13. Constructive Discharge

The law does not consider acts of discrimination as a cause of constructive discharge. The cases in which the employee may claim constructive discharge are as follows: (1) Any of the following misconducts of a serious nature, duly proven: (a) lack of integrity; (b) sexual harassment behaviours; (c) acts of aggression exercised by the employer against the employee; (d) insults made by the employer to the employee; (e) immoral conduct of the employer affecting the employee; (f) failure to sanction or put an end to mobbing acts performed by other employees or harassment by the employer. (2) Acts, omissions or rash actions affecting the safety or the activities of the employee or their health. (3) Serious breach by the employer of his labour contract obligations.

If the claim is rejected, it is understood that the contract was terminated by voluntary resignation of the employee.

In case of acts of discrimination, the employee may exercise the same actions than in the case of retaliation mentioned in the above section 17.12.

17.14. Mobbing

The concept of labour harassment has been defined by the Act 20,607 published in 2012. Labour harassment or mobbing – a term used to name this type of aggression – is defined as any conduct that constitutes harassment or repeated aggression exercised by the employer or by one or more workers against one or more employees by any means, and that results for those affected by their impairment, abuse or humiliation, or that threaten or harm their employment status or employment opportunities. Mobbing acts entitle the employer to dismiss the mobbing offender with no severance pay.

The fact that the employer incurs in mobbing behaviours entitles the employee to sue his constructive dismissal before the Courts of Justice.

17.15. Checklist of Do's and Don'ts

– A system of performance assessment is recommended in order to attest that a discharge for business needs of an employee performing similar work to another employee is not due to arbitrary discrimination but for his performance.
– Before discharging an employee, it is important to know whether there is sufficient evidence to justify in a trial the veracity of the facts underlying the grounds for the discharge.
– Establish a special procedure within the Internal Ruling, in order to investigate and punish acts which may constitute mobbing or labour harassment.

18. SMOKING IN THE WORKPLACE

18.1. Overview

The Labour Authority, by ORD 3029 of 12 July 2010, set important requirements which must be included in the Internal Rules of each employer concerning smoking in the workplace.

Act 20,660, in force since 1 March 2013, forbids any smoking within closed spaces of any kind. This legal modification redefines the concept of closed spaces, including almost any type of areas.

18.2. Checklist of Do's and Don'ts

– Smoking must be forbidden inside indoor facilities of the company.
– It is convenient to designate open spaces where employees may smoke.

19. USE OF DRUGS AND ALCOHOL IN THE WORKPLACE

19.1. Overview

The Labour Authority issued on 12 July 2010, ORD 3031, establishing important requirements that must be included in the Internal Rules of each employer concerning drug and alcohol consumption.

This ruling sets out basic requirements that must be included in the Internal Rules concerning drugs and alcohol consumption, such as who or which (individuals or institution) will be in charge of the control and what will be the control mechanism as well as the procedure to be followed. In this regard, it requires temporal and territorial limit for the application of the control. They may affect only the tasks, stay and life of the employees in the company, without extending itself to activities outside working hours and workplace.

It also provides that any control measures taken by the employer to avoid drugs and alcohol consumption, may only be done by suitable means consistent with the nature of the employment relationship and, in any case, its application must be general, ensuring the impersonality of the measure and the respect of the dignity of the employee. Thus, the Labour Authority notes that any control measure must be subject to the principle of proportionality and must comply with the requirements established by law (generality and impartiality of the measure) and those derived from administrative doctrine (such as advertising control measures, among others).

Furthermore, the *Labour* Authority establishes the following additional requirements to be included in the Internal Rules:

(a) a reference as to what is to be considered as drugs (or if, for instance, the qualification will be that of Articles 1 and 2 of the rules of Act 20,000 which sanctions the illegal traffic of narcotic drugs and psychotropic substances);
(b) a rule establishing what is to be deemed as *under the influence* of said substances, as among other things, this will determine whether the employee may perform or not his daily work.

Finally, according to this ruling, it is essential to incorporate in the Internal Rules and in the Labour Code some regulations protecting the privacy of the employees according to the requirements of Act 19.628 (rules of proper treatment of Personal Data of the employees).

19.2. Checklist of Do's and Don'ts

– Strict confidentiality must be kept of the results of alcohol and drug tests.
– Any alcohol and drug tests must be conducted randomly among the employees.

20. AIDS, HIV, SARS, BLOODBORNE PATHOGENS

20.1. Overview

There are no special rules regarding the control or examination of such diseases in the workplace without prejudice to the duty of the employer to require the corresponding tests to determine if the employee meets the requirements or conditions for the specific work to be performed, since an employee cannot be required or admitted to perform work classified as beyond his strength or that may compromise his health or safety.

In any case, because of Article 154*bis* of the Labour Code, the employer must maintain confidentiality of all information and private data of the employee to which he has access due to the labour relationship.

20.2. Checklist of Do's and Don'ts

– Maintain strict confidentiality of test results of employees whose knowledge the employer has.

21. DRESS AND GROOMING REQUIREMENTS

21.1. Overview

Internal Rules must include, among other things, the obligations and prohibitions to be observed by the employees, related to their work, stay and life in the workplace of the respective company or establishment.

In this regard, the employer is entitled to require the dress and grooming conditions in the company's workplace as it deems convenient, provided they are appropriate and consistent with the nature of work and position in the company or establishment and non-discriminatory. In any case, their application must be general, ensuring the impersonality of the measure, to respect the dignity of the employee.

21.2. Checklist of Do's and Don'ts

– There must be common rules applicable to all those performing similar work in the company or establishment.

22. PRIVACY, TECHNOLOGY AND TRANSFER OF PERSONAL DATA

22.1. Privacy Rights of Employees

Article 154*bis* of the Chilean Labour Code states that the employer shall maintain reserve of all private information and data of the employee to which it has access due to the labour relationship.

It is very important to bear in mind that Article 5 of the Labour Code expressly states that employers can exercise their rights within the limits imposed by the Constitution, especially regarding respect of privacy. Employers must abide by and comply with the privacy statements.

The Labour Authority *(Dirección del Trabajo*) pronounced on Article 154*bis* by means of ORD 1662-39 of 2 May 2003. The statement is the result of a query placed by an administrative body regarding its obligation to maintain confidential the data and information of their dependants (employees). In view that municipal officers and councillors, in several occasions, had requested information on labour agreements, salaries, indemnifications, social security payments, and severance payments of certain dependents of said administrative body, the Labour Authority stated that if the administrative body provided the labour agreements/contracts and the information contained in them, besides salaries, indemnifications, social security payments, and severance payments, it would mean, without a doubt, a serious transgression of the duty of confidentiality that the employer must maintain regarding antecedents of the specific private area of its dependent. In the opinion of the Authority, the mandatory wording of Article 154*bis* must prevail: 'the employer shall maintain reserve of all private information and data of the employee to which it has access due to the labour relationship'.

In addition, the ORD. 0260/0019, dated 24 January 2002 of the Labour Authority ruled on whether the employer can access the contents of emails sent and received by the employee through an email system of the company. Before reaching the final judgment, the Labour Authority recognizes the existence of a conflict between two constitutional guarantees. On one hand, the constitutional guarantee of the inviolability of all forms of private communication, which backed by subsection 1 of Article 5 of the Labour Code, protects the employee, and on the other, the constitutional guarantee of property rights, which gives the employer the right to organize, direct and manage its business. The employer has the right to regulate the conditions, frequency and timing of use of their property, but provided they do not violate the constitutional guarantee of the inviolability of all forms of private communication. In this regard, the Labour Authority sees no objection in the regulation of the corporate email, provided they do not affect the above-mentioned constitutional guarantee.

According to the labour ruling, the employer can regulate the conditions, frequency, and timing of the use of corporate email. In this way, the company could enact that all emails that are sent from the company server will have to be sent with a copy to management. Moreover, the employer may regulate the use of non-productive email. These measures should be included in the Internal Rules, to which the employee had prior knowledge.

Consequently, it is allowed to review or audit corporate emails to the extent that meet certain requirements or conditions as the corporate email is a tool that the employer makes available to employees for the faithful performance of its orders. The control measures of the employer regarding the use of corporate email cannot involve excessive control that infringes the rights of privacy and dignity of the employee. The review or audit of corporate emails must be incorporated in the Internal Rules so that employees are aware that the corporate emails can be monitored and audited. In addition, it should include an internal procedure for reviewing such mailings, which has to protect and not infringe the privacy rights, dignity, and honour of the employees. The review should be random (all employees of the company, or an area or a particular section of the company) or be the result of a specific complaint about misuse of the corporate email, which should be seen in the rules of procedure. The review, in this case, should be limited to verifying the existence of the infringement charged.

The employee must also understand that the corporate or institutional email should be used only for work; the employee should maintain his/her personal relationships or personal effects out of this area of corporate emails. Even though the employer cannot access personal emails in any respect, could limit their access.

However, according to the Chilean Privacy Act, Personal Data processing does not require authorization (from the holder) if the data comes or was collected from publicly accessible sources. The data needs to be: (1) economic, financial, banking, or commercial type (with the specific labour restrictions mentioned in the letter c) before); (2) or the data needs to be contained in listings related only to a category of people to indicate their background, such as its profession or activity, education, address, or date of birth; (3) or the data are necessary for commercial or financial communication or direct sale of goods or services; (4) in addition, the Data Privacy Act states that the aforesaid authorization is not required if the company needs the data for internal reasons not be disclosed to third parties. Furthermore, the law requires employers to protect Personal Data from improper disclosure.

When consent is a requirement, the authorization for the treatment of his Personal Data provided by the holder must be express (precise, clear); informed (the person that gives its consent shall properly be informed with respect to the intention of the storage and their possible communication to the public); and it must be made in writing. The authorization can be revoked, although without

retroactive effect, which also will have to be made in writing. The Personal Data must be used only for the purpose for which they have been collected.

General rules of law are still applied, by virtue of which the parties may have access to the information to the extent and where there is a legal requirement and/or a prior court order that justifies and authorizes said access.

Keep in mind that in March of this year, a bill was presented in Congress that modifies the current legislation on Personal Data; whose purpose is to provide the holder of Personal Data with greater protection, regulate their rights, create a Personal Data Protection Agency, and regulate international data transfer (cross-border flow of data). All this, in order to be able to adapt to the international standards and be competitive in matters of protection of the digital economy.

22.2. Transfer of Personal Data

The processing of Personal Data in records or data banks by public or private entities are subject to the provisions of Law No. 19.628 (hereinafter *The Privacy Act*), except if it is made in exercise of the freedom of opinion and reporting, which is governed by the law referred to in Article 19, No. 12 of the Chilean Constitution. Any person may process Personal Data, provided it is done in a manner consistent with The Privacy Act and for purposes permitted by law. In any case, said process must respect the full exercise of fundamental rights of the holders of said data and the powers of The Privacy Act recognizes.

The processing of Personal Data can only take place when The Privacy Act or other legal regulations authorize it or the holder expressly agrees to it. The authorizing person must be duly informed about the purpose of storing Personal Data and the possible communication to the public. The authorization must be in writing. The authorization may be revoked, but without retroactive effect, which must also be in writing. Personal Data should be used only for the purposes for which they have been collected, unless they come from, or have been gathered from, public sources. In any case, the information must be accurate, current, and answer truthfully to the real situation of the holder of the data.

The person responsible for the records or databases where Personal Data are stored after being collected should take care of them with due diligence, taking responsibility for damage.

Until now, in Chile, the cross-border movement of data is allowed, to the extent that the regulations of the law are complied with. This flows from interpreting the history of The Privacy Act, which contained an article in its original bill banning the responsibility of Personal Databanks from transmitting Personal Data from or to countries which legal regulations did not offer guarantees analogue to those of The Privacy Act. Therefore, the current Chilean

legislation does not include provisions regarding the cross-border transfer of data. Nevertheless, the Chilean government has recently introduced a new Privacy Data Protection bill to meet the international standards and comply with the OECD directives that Chile has subscribed. It also includes OECD data protection standards on international data transfers and the creation of a Data Protection Authority.

22.3. Checklist of Do's and Don'ts

- Employers can exercise their rights within the limits imposed by the Constitution, especially regarding respect of privacy.
- The employer shall maintain reserve of all private information and data of the employee to which it has access due to the labour relationship. Personal Data should be used only for the purposes for which it has been collected.
- The use of the email could be regulated within the company by means of an internal regulation, respecting the constitutional rights of the employees. In effect, the employer has the right to regulate the conditions, frequency and opportunity of use of its property, but to the extent that it does not violate the constitutional right of inviolability of all form or manner of private communication. The power to review corporate email must be provided in the Internal Rules so that employees are aware that the corporate emails can be monitored and audited. The review of the institutional or corporate email should respond to measures that are appropriate, essential to, proportional, and justified. The employee's personal email cannot be accessed by the employer.

23. WORKPLACE INVESTIGATIONS FOR COMPLAINTS OF DISCRIMINATION, HARASSMENT, FRAUD, THEFT AND WHISTLEBLOWING

23.1. Overview

Under the Labour Code, the company's Internal Rules must at least include a procedure for investigating complaints of sexual harassment and one for investigating claims of breach of the principle of equal remuneration for men and women performing the same job. However, there may also be procedures for investigating other conducts inside the company that are deemed inappropriate, like mobbing, provided they are of general application, impersonal and respecting the dignity of the employee.

Although it is not a labour obligation, it has to be borne in mind that on 2 December 2009, the enactment of Act 20,393 created the legal concept of criminal liability of legal entities, non-existent in our country until that date. This means that, as of that date, legal entities are not only civilly liable for the crimes committed by their agents, representatives, employees with management or supervisory powers, but they are also criminally liable. For now, this is only applicable to offences of money laundering, bribery (bribery of public employees), and terrorist financing, when the said offence is a result of the failure to comply with the duties of direction and supervision.

The law presumes compliance with the duties of direction and supervision if prior to the offence, the company adopted and implemented models of organization, administration and supervision to prevent offences such as the one committed.

It is therefore advisable for companies to adopt and implement a prevention model that contains, at least: the appointment of a manager of prevention, defining his means and powers, the establishment of a crime prevention system and the supervision and certification of the system in place. The certification may be issued by external audit firms, risk rating agencies or other entities registered with the Chilean SEC.

23.2. Checklist of Do's and Don'ts

Any internal investigation performed by the employer must be done subject to a procedure set up in the Internal Rules of general application, impersonal and respecting the dignity of the employee.

24. AFFIRMATIVE ACTION/NON-DISCRIMINATION REQUIREMENTS

24.1. Overview

According to Article 62*bis* of Labour Code, the employer must comply with the principle of equal remuneration between men and women doing the same job and that the Internal Rules must include a procedure to submit claims which are caused by violation of this equality.

Also, paragraph 3 of Article 231 of the mentioned Code disposes that Union's bylaws must consider a mechanism designed to ensure that the board of directors is composed of female directors in a proportion not less than one-third of the total of its members who enjoy immunity and the other prerogatives established by the Code, or by the proportion of female directors

that corresponds to the percentage of affiliation of female workers in the total number of affiliates of the union, in the case of being lower.

24.2. Checklist of Do's and Don'ts

– Include in the Internal Rules a procedure to submit claims based on a violation of the principle of equal remuneration between men and women doing the same job.

25. RESOLUTION OF LABOUR, DISCRIMINATION AND EMPLOYMENT DISPUTES. LITIGATION, ARBITRATION, MEDIATION AND CONCILIATION

25.1. Internal Disputes Resolution Process

As it was previously mentioned, any internal procedure for resolving disputes in the company should be established in the Company's Internal Rules. For that purpose, the law expressly requires certain minimum matters to be included in the Internal Rules such as the appointment of an executive or dependent so as to address internal requests, complaints, questions and suggestions.

In addition, Internal Rules must contain the applicable sanctions for violation of obligations set forth in the internal regulations; the procedure for application of the sanctions; the procedure, measures and sanctions to be applied in cases of sexual harassment complaints (according to Article 154 No. 12 of the Labour Code); and finally, the procedure applicable in case of claims for violation of the principle of equal remuneration between men and women who carry out equal functions (according to Article 154 No. 13 of the Labour Code).

Furthermore, other procedures to resolve internal disputes may be included in the Internal Rules documents as the company deems necessary.

25.2. Mediation and Conciliation

In Chile, there are no agencies or independent instances for Mediation and Conciliation in labour matter. Nevertheless, with the amendments to the labour law entered into force recently, mediation by the Labour Authority is acceptable in any collective conflict.

The law referred to Labour Courts as the exclusive competent authority for the resolution of labour disputes. In this sense in the ordinary procedure

for labour dispute resolution, a mandatory conciliation hearing is considered before the evidence presentation.

25.3. Arbitration

In Chile, it is not allowed that labour controversies are resolved by a private arbitration. The only exception is arbitration to resolve matters relating to collective bargaining. The arbitration is mandatory in collective negotiations where a strike, temporal closing, and lockout are prohibited.

25.4. Litigation

In matters related to litigation before a Labour Court, it is important to consider that law contemplates three main litigation procedures:

(a) the Ordinary procedure to resolve labour disputes;
(b) a simpler and faster procedure called Monitory in case where the amount in dispute is equal or less than ten minimum salaries; and
(c) the procedure to claim discrimination and violations of the fundamental rights of employees which is known as *Tutela laboral*.

Even though the filling of a suit is by means of a written presentation, judicial procedures are conducted mainly through an oral hearing to save time and be more efficient.

In case of final decisions in the ordinary procedure, the only remedy available is the appeal for annulment, if during the process or in the final decision Constitutional rights 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 the appeal is ten days. Exceptionally, an appeal of unification of jurisprudence may be filed if there are different interpretations of the Superior Courts of Justice regarding the subject matter of the trial. The deadline for filing this appeal is fifteen days.

25.5. Fine, Penalties and Damages

In general terms, breaching labour obligations by the employer has consequences, such as employer's obligation to pay any due amount according to law.

Also, there are fines regulated by law. For instance, in case of unfair – dismissal, legal indemnification must be paid increased from a 30% up to 100% depending on the dismissal cause unfairly invoked. Also, in case of

discrimination or breach of constitutional rights with the occasion of the dismissal, the employer can be condemned to pay a fine in favour to the employee that is equivalent to six to twelve months' salary.

In addition, in case of non-compliance with labour obligations, administrative fines can be applicable and their amount will depend on the nature of non-compliance and the company's number of employees.

25.6. Checklist of Do's and Don'ts

– In case of conflict and before the initiation of a judicial procedure, use internal procedure to resolve conflicts.
– When considering dismissing an employee, the employer must be very careful neither to discriminate the employee nor to breach any of his/her constitutional rights with the occasion of the dismissal.

26. EMPLOYER RECORDKEEPING, DATA PROTECTION, AND EMPLOYEE ACCESS TO PERSONNEL FILES AND RECORDS

26.1. Overview

In general terms, personnel files are a positive labour practice which allows authority to duly conduct revision procedures and also allows companies to have order in its personnel management. *See* as well section 22 above-mentioned.

It is important to have in mind that employees' personal and sensitive information must be treated as confidential by the employer, so any use of such information must be related to labour and internal purposes. Moreover, this kind of information is subject to the provisions of the Data Privacy Act and there is a requirement that personal information shall be accurate and up to date.

26.2. Personnel Files

The processing of Personal Data by public or private entities in records or data banks is subject to the provisions of Law No. 19.628 (*The Privacy Act*). The person in charge of the records or databases where Personal Data are stored after being collected should take care of them with due diligence, taking responsibility for damage.

In this regard, when consent is a requirement, the authorization for the treatment of his Personal Data granted by the holder must be express (precise, clear); informed (the person that she authorizes must properly be informed with respect to the intention of the storage and their possible communication to the public); and it must be made in writing. The authorization can be revoked, although without retroactive effect, which also will have to be made in writing. The Personal Data must be used only for the purpose for which they have been collected.

According to the labour law, the employer has to keep a record of the hours worked each day, daily working time and overtime, days of sickness, and periods of vacation. Furthermore, the employer is obliged to keep payroll information including the name and home address of the employee, date of birth, sex, occupation, agreed work, and agreed hours of work. With regard to the payroll, the employer has to keep relevant internal information, such as agreed salary, hours worked, health insurance and fees. Also, working hours of each employee must be calculated daily, by recording, using any means, the starting and finishing hours of each working period or by keeping a record of the number of hours worked.

In this sense, the employer has to inform the Labour Authorities about any termination and it has to maintain the necessary information from the employees.

The employer must keep files with the data and information of its employees such as employment contracts, receipts for payment of salaries and pension contributions and vacations, among others. The law allows such information to be kept by the employer within the central premises of the Company.

26.3. Confidentiality Rules

According to Article 154*bis* of Labour Code, the employer has the obligation of treating as confidential, any employee's information and private data disclosed because of labour relationship. Among others, this obligation includes any Personal Data, health information, results of alcohol and/drug tests, etc. *See* as well section 22 above-mentioned.

26.4. Employee Access

As personnel files contain documents and information (see section 26.2) known by the employee, there is no legal restriction in order to allow him the access to the file and even require a copy of documents. Furthermore, there is a requirement that personal information shall be accurate and up to date.

27. REQUIRED NOTICES AND POSTINGS

27.1. Overview

Except for the cases mentioned above (terminations, etc.), for any applicable policies and for the Internal Rules Code Health, Hygiene and Safety Regulations, the law does not require notices to be posted where employees have easy access to the information.

Any applicable policies or Internal Rules Code need to be referred to in the Labour Contract and a copy of it must have been given to the employee, who must sign a copy to prove its receipt.

In addition, Internal Rules Code needs to be posted as described under section 2.4.

Dismissal must be informed with a notice sent thirty days before termination, unless a severance payment is paid in lieu of such notice. Terminations need to be informed by a letter delivered in person at the termination process, or by a certified letter sent within three days since termination.

Changes in the labour schedule for circumstances affecting the whole process of the company or some of its units are authorized, changing in up to 60 minutes, provided employer informs the change with a notice sent thirty days in advance.

27.2. Checklist of Do's and Don'ts

– Notices and posting as stated in the applicable laws are essential in order to make applicable the corresponding termination, rulings, etc.