

THE LITTLER MENDELSON GUIDE TO
INTERNATIONAL EMPLOYMENT
AND LABOR LAW

THIRD EDITION

COSTA RICA

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COSTA RICA

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COSTA RICA

§ 1

I. SOURCES OF LAW

§ 1.1

A. What are the primary constitutional provisions, statutes and regulations related to employment?

The following are the main sources of law related to employment in Costa Rica.

§ 1.1(a)

Constitutional Provisions

Most of the constitutional rights included in the Costa Rican Constitution are applicable to employment as they are basic rights of all individuals. For instance, Article 33 states that all humans are equal before the law and that no discrimination affecting human dignity is allowed. Although this is a general provision, it is applicable to labor-related matters. In addition, Article 50 of the Constitution mandates that the government is obligated to procure the highest level of wellness among all the country's inhabitants by organizing and stimulating production and the most appropriate distribution of wealth. In both cases, even though these are very general provisions, they are fully applicable to employment.

There are also specific constitutional articles that are applicable to employment, such as the following:

- Article 56 states that labor is a basic constitutional right of all individuals and that working is an obligation of all individuals towards society. This article also imposes an obligation on the government to look after the existence of as many sources of labor as possible. It further requires the government to procure honest and useful occupations for everyone, and mandates that all individuals must be duly paid. This article also guarantees that labor shall not become a sort of merchandise. In addition, it mandates that everyone is free to choose his or her occupation or work, and that the government must guarantee this freedom.
- Article 57 establishes that everyone is entitled to receive at least a minimum wage that is periodically established by the corresponding authorities. Such minimum wage must be sufficient as to guarantee a certain level of wellness and a dignifying existence. This provision also mandates that under identical conditions, payment must be the same for all individuals.
- Article 58 indicates that the ordinary daily shift shall not exceed eight hours per

day and 48 hours per week. It also stipulates that the night shift shall not exceed six hours per day and 36 hours per week. Pursuant to this article, overtime must be paid at a rate equal to an additional 50% of ordinary salary. All of the above is subject to legally established exceptions.

- Article 59 states that all workers shall be entitled to at least one day of rest for each six consecutive days of labor. Workers receive annual paid vacations that shall be of at least two weeks for each 50 weeks of continuous labor.
- Article 60 states that all workers have the right to incorporate and/or to be part of unions. Foreign citizens are not allowed to be directors or to have any authority within such unions.
- Article 61 guarantees that all workers have the right to strike and that employers have the right to lockouts, with the exception of cases in which public services are being rendered.
- Article 62 indicates that all collective bargaining agreements shall have the same force as law.
- Article 63 establishes the right of all workers terminated without just cause to receive indemnification.
- Article 64 stipulates that the government must support the creation of cooperatives as a way of promoting better conditions for workers.
- Article 65 orders the government to promote the construction of popular housing to help the worker put together his or her family assets.
- Article 66 establishes that employers must adopt all necessary measures to guarantee proper health and hygiene conditions at the workplace.
- Article 67 obligates the government to look after the technical and cultural training and education of all workers.
- Article 68 indicates that no discrimination with respect to salary, benefits, or any other labor conditions shall be made among workers. However, under the same conditions, Costa Rican workers shall have preference over foreign citizens.
- Article 69 states that all sharecropping agreements must be duly regulated so as to guarantee a rational exploitation of soil and a fair distribution of the resulting products between croppers and the property owners.
- Article 70 establishes the creation and implementation of courts specializing in labor-related issues.
- Article 71 states that women and minors shall have special protection with regard to their work.
- Article 72 indicates that the government must keep and support a permanent technical protection system for individuals involuntarily unemployed and will attempt to procure them employment.
- Article 73 orders the creation of Social Security in favor of all workers and entrusts its administration in the Costa Rican Social Security Agency (CCSS).
- Article 74 states that all of the above rights cannot be waived.

§ 1.1(b)

Legal Provisions

The most important laws that are applicable to employment are the following:

- Labor Code, which establishes the general rules governing all labor relationships.
- Statute of the Civil Service, which governs the labor relationship between the Government's Executive Power and its employees.
- Statute of Service of Congress, which governs the labor relationship between Congress and its employees.
- Statute of Judicial Service, which governs the labor relationship between the Government's Judicial Power and its workers.
- Statute of the Foreign Affairs Services, which governs the labor relationship between the Ministry of Foreign affairs and its employees.
- Law for Equal Opportunities for Disabled People.
- Law for Worker's Protection, which establishes the rules for the administration of retirement plans.
- Framework Law of the Ministry of Labor.
- Law for Prohibition of all Types of Labor-Related Discrimination.
- Prohibition of Labor-Related Discrimination.
- Law of Salaries for the Public Administration.
- Law of Labor-Related Risks.
- General Law of Health.
- Law on Tipping (containing the rules for payment of tips to restaurant waiters and waitresses).

§ 1.1(c)

Administrative Provisions

Administrative provisions are issued by the Executive Power (President and Ministers). The following administrative provisions are most frequently applied to labor relationships:

- Decrees establishing Minimum Wages (updated every six months);
- Decrees establishing raises in salaries for Public Servers (updated every six months);
- Instructions for the National Direction of Labor Inspection of the Ministry of Labor to attend denunciations;
- Regulations of the Statute of the Civil Service;
- Regulations of the Law for Equal Opportunities for Disabled People;
- Regulations for granting studying subsidies for tax-paying workers of the Risks of Labor Regime;

- Regulations to the Law of Christmas Bonuses in Private Companies;
- Regulations for Women’s Nighttime Labor;
- Regulations for the Internal Policies on Labor Relationships and Conditions in Workplaces;
- Regulations to the Law of Tipping;
- Regulations to Article 148 of the Labor Code;
- Regulations of the National Salaries Council;
- Regulations for Collective Bargaining Agreements Negotiation;
- Regulations for Temporary Working Permits for Foreign Citizens;
- Regulations for the Registration of Companies before Immigration and the Migration Regulations for their Personnel;
- Regulations for the Law of Labor-Related Risks;
- Regulations of the Labor Health Commissions;
- Regulations of Labor Health Departments or Bureaus;
- Regulations on Emergency Ladders;
- Regulations for the Control of Noises and Vibrations;
- Regulations on Industrial Hygiene;
- Regulations on Construction Safety;
- Regulations on Labor Conditions and Labor Health of Bus Drivers;
- Regulations for the Organization and Services of the Labor Inspection; and
- Regulations on Security and Hygiene at the Workplace.

§ 1.1(d)

International Treaties

As a member of the International Labour Organization (ILO), Costa Rica has ratified the international treaties listed in § 1.2 below and has adopted them as part of Costa Rica’s internal regulations.

§ 1.1(e)

Case Law

Case law from the Second Chamber of the Supreme Court and from the Superior Labor Court of Appeals is a very important source of labor law principles as it provides the interpretation of ambiguous legal provisions. Notwithstanding the above, it must be noted that despite its important weight at the time judges make decisions, such case law has no legally binding effect.

The legal system in Costa Rica is based on legal provisions; hence cases are resolved, not based on previous cases, but on what the law stipulates. Case law helps the parties involved in a conflict, including the judge, interpret the law in accordance with the applica-

ble legal principles. However, case law can change at any time and is not necessarily binding. Thus, very similar cases can be resolved differently depending on their particular circumstances. Nevertheless, the above does not mean that case law is not an important source of law.

It is also important to mention that case law from the Constitutional Supreme Court is also an important source of law as it is binding for all individuals and not only has the authority of establishing new binding rules of interpretation of legal provisions, but also of reforming or even repealing legal principles if the Constitutional Supreme Court shall consider them unconstitutional.

§ 1.2

B. What international treaties apply to employment?

As mentioned above, Costa Rica is a member of the ILO and, as such, has adopted most of the ILO's international treaties. Among these treaties, the following are the most important and the most frequently applied:

- International Treaty on Hours of Labor (C1);
- International Treaty on Unemployment Indemnifications (shipwrecks) (C8);
- International Treaty on Association Rights (agriculture) (C11);
- International Treaty on Weekly Rest (industry) (C14);
- International Treaty on Medical Examination of Minors (sea labor) (C16);
- International Treaty on the Methods for the Establishment of Minimum Wages (C26);
- International Treaty on Forced Labor (C29);
- International Treaty on Women's Underground Labor (C45);
- International Treaties on Labor Inspection (C81);
- International Treaty on Syndic Freedom and the Protection of the Right of Syndicalism (C87);
- International Treaty on the Service of Employment (C88);
- International Treaty (revised) on Nighttime Labor (women) (C89);
- International Treaty on Nighttime Labor of Minors (industry) (C90);
- International Treaty on Crew Lodging (C92);
- International Treaty on Labor Clauses (C94);
- International Treaty on the Protection of Salary (C95);
- International Treaty on the Right of Syndicalism and Collective Negotiations (C98);
- International Treaty on the Methods to Establish Minimum Wages (agriculture) (C99);
- International Treaty for Equal Remuneration (C100);

- International Treaty on Paid Vacations (agriculture) (C101);
- International Treaty on Social Security (C102);
- International Treaty for the Eradication of Forced Labor (C105);
- International Treaty on Weekly Rest (commerce and offices) (C106);
- International Treaty on Native Populations and Courts (C107);
- International Treaty on Discrimination (C111);
- International Treaty on Minimum Age (fishermen) (C112);
- International Treaty on Medical Examination for Fishermen (C113);
- International Treaty on Fishermen Enrollment Agreement (C114);
- International Treaty on Social Policies (C117);
- International Treaty on Hygiene (commerce and offices) (C120);
- International Treaties on Employment Policies (C122);
- International Treaty on Maximum Weight (C127);
- International Treaty on Labor Inspection (agriculture) (C129);
- International Treaty on Medical Assistance and Economical Benefits for Sickness (C130);
- International Treaty on the Establishment of Minimum Wages (C131);
- International Treaty for the Prevention of Accidents (seamen) (C134);
- International Treaty on Workers' Representatives (C135);
- International Treaty on Port Labor (C137);
- International Treaty on Minimum Age (C138);
- International Treaty on Rural Workers' Organizations (C141);
- International Treaty on Tripartite Consultation (C144);
- International Treaty on Employment Continuity (C145);
- International Treaty on Merchant Navy (C147);
- International Treaty on Labor Environment (C148);
- International Treaty on Labor Administration (C150);
- International Treaty on Professional Rehabilitation and Employment (disabled people) (C159);
- International Treaty on Labor Statistics (C160);
- International Treaty on Native and Tribal Populations (C169); and
- International Treaty on the Worst Kinds of Children Employment (C182).

§ 1.3

C. What are the primary mechanisms for enforcement?

Although it is not a legal requirement, employees typically invoke administrative proceedings before the Ministry of Labor, whose sole purpose is trying to reach a settlement between the parties, before taking their conflicts to court. In these cases, although the parties will be summoned and a hearing will be held, if any party fails to appear or if no settlement is reached, there will be no consequences. However, if a settlement is reached, it will have binding and final effect on the matter.

Enforcement of employment-related provisions can also be achieved through a lawsuit, which does not require a prior hearing at the Ministry of Labor and is resolved by a specialized Labor Court.

If the case is submitted to a Labor Court, then an ordinary lawsuit has to be filed. The judge, after considering the evidence, resolves the conflict by the means of a definitive and mandatory court ruling.

Labor-related rights may also be enforced through conciliation and/or arbitration. However, the effectiveness of such proceedings depends directly on the parties' willingness to resolve the case through such proceedings.

§ 1.4

D. What are the primary means for resolving disputes between employees and employers?

When a conflict arises between an employer and an employee and both parties agree to resolve it without going to court, they generally utilize conciliation.

In conciliation, the parties may either resolve the issue privately by signing an agreement, or may request the Ministry of Labor or any authorized Conflict Resolution Center to start conciliation proceedings. Such a request may be submitted jointly or by one of the parties, and the other party will be summoned to attend a hearing. The advantage of resolving a conflict before the Ministry of Labor or a legally recognized Conflict Resolution Center is that the settlement is definitive and has the same force and effect as a court ruling. Therefore, if one of the parties does not comply, the other is entitled to require the enforcement of the agreement at a court of law in relatively short and simple proceedings.

It is important to mention that even after a judicial lawsuit has been initiated and regardless of the stage of the litigation, the parties can resolve their dispute through conciliation. Indeed, after the initiation of an ordinary judicial procedure, the judge will schedule a special hearing to promote conciliation between the parties. Such a hearing is part of the normal proceedings. Nevertheless, even if the parties do not settle during such a hearing, the possibility of settling the case will always be there.

Finally, the parties may also decide to submit the case to the decision of an arbitration board. The decision of the board will result in a mandatory and definitive resolution of the case. However, as mentioned before, the effectiveness of an arbitration process will

depend on both parties agreeing to submit the case to arbitration.

§ 1.5

E. What are the definitions of employee, employer, independent contractor, and contingent worker (i.e., a temporary or agency worker)?

Article 2 of the Labor Code defines *employer* as “any person or corporate entity, private or public, that employs the services of another or of others, based on an express or implied labor contract, written or verbal, individual or collective.”

Employee is defined by Article 4 of the Labor Code as “any person who gives another person or entity his material, intellectual or material/intellectual services, based on an express or implied labor contract, written or verbal, individual or collective.”

Concerning the term *independent contractor*, there is no definition in Costa Rican law. Therefore, in order to differentiate between an employee and an independent contractor, it is necessary to analyze the labor relationship.

With regards to *contingent workers*, Costa Rican law does not include such a term. What is possible under Costa Rican labor law is to hire someone as an employee to perform certain specific tasks or to work for a certain amount of time. Upon completion of said tasks or upon expiration of the term of the contract, the employment relationship can be deemed as terminated; unless, regardless of what the contract states, the employee continues rendering services to the same employer, in which case the relationship tends to turn into a common employment relationship for an unlimited amount of time.

Article 18 of the Labor Code states that “Individual labor contract, or whichever way it is actually called, is any of such in which a person commits to give another person or entity his services or to undertake a piece of work, under permanent dependency and immediate or delegated direction of such other entity or person, and in exchange for a payment of any kind or form.”

From these legal foundations, local case law unanimously finds that there are three basic elements in a labor relationship. These elements are crucial in determining whether the link between the parties is of the labor kind, and thus subject to all stipulations and protections of the Labor Code, or of a nonlabor kind, solely governed by ordinary and non-protectionist civil regulations. The three basic elements are:

1. the service must be rendered personally;
2. such service must be paid for; and
3. the service must be rendered under subordination with respect to the employer.

Among these elements, subordination is considered the main and essential factor for the determination of the presence of an employment-type relationship. The other two elements may be present and yet not necessarily imply the application of labor law.

§ 1.5(a)

Personally Rendered Service

With regards to the first element of personally rendered service, a contractual relationship cannot be considered as a labor relationship if the service is not provided personally by the individual hired. The individual who has been hired is the only one authorized to render the corresponding services and cannot be substituted.

In a labor relationship, the party receiving the services is not only interested in the provision of the services *per se*, but also in the personal capacities of a specific individual. Local case law has clearly stated that an important factor weighing against the existence of a labor relationship would be the detection of services being rendered by parties other than the one signing the agreement. Also, if the party being hired has the right to determine which specific individual or individuals will actually provide the services, it is likely that the relationship is an independent contractor relationship rather than an employment relationship.

Local courts have even found that once the possibility of substitution exists and has actually occurred, it is not necessary to determine if the other elements that create a labor relationship are present as the absence of the “personal service” element is considered sufficient to rule out the application of labor law.

The above does not mean that a labor relationship will be avoided by solely indicating in the agreement between the parties that the services can be performed by other individuals. Such a fact must be confirmed in the day-to-day reality of the services rendered. As such, services must be performed by the contracting party or by any other individual selected for those purposes, if the replacement meets the criteria established in the contract.

§ 1.5(b)

Payment

With regards to the payment element, for the relationship to be considered of the labor-type, the service provider must be compensated for his work. Payment in an employment relationship can be calculated by unit of time, by task, or by piece of work. Payment can be made in currency and/or in kind. Participation in earnings or profits, sales or collections from the employer is also possible. Nevertheless, this is not an element that will clearly make a difference between an employment relationship and an independent contractor relationship.

§ 1.5(c)

Subordination

As indicated above, the subordination element is the third element differentiating a labor relationship from an independent contractor relationship. This element is considered essential to the existence of a labor relationship and is defined as the condition in which the employee’s autonomy is limited with regards to the provision of the services. Due to the written or oral agreement with the employer, such limitation comes from the capacity of the employer to guide the employee’s activities, to give orders to the employee, and to unilaterally change some of the terms and conditions of the labor agreement.

Subordination is considered an actual dependency condition created by the employer's right to direct and give orders, and the consequent obligation by the employee to follow such orders and submit to the employer's will. However, for subordination to exist, it is not sufficient to detect the possibility of giving orders, since the right to give them and to replace, at-will, the individual providing the services is also considered necessary by local courts to confirm the existence of this element.

Subordination also includes the ability of the employer to discipline the employee in cases of bad performance or misbehavior. Basically, the employer is capable of imposing direct orders and penalties when orders are not followed. This inquiry is often ambiguous, since a nonlabor relationship often allows the contracting party to establish guidelines as to how the services will be provided. However, while such guidelines may exist in the nonlabor relationship, there is no direct supervision or disciplinary regime for the individuals providing the service.

For example, the obligation of reporting on how tasks have been completed does not by itself create a subordination regime. Instead, this duty of providing essential information could also be present in a nonlabor relationship as a performance obligation. If in addition to this obligation of information, the performance of the services is controlled by the service receiver with regards to the actual manner of undertaking the work activities (and not only to their quality), the relationship will likely be considered as a labor-type.

What is also accepted and not considered to create a labor relationship is when the party contracting the services is merely coordinating the activities (instead of directly controlling how such services are rendered). In such cases of coordination, the link of the service provider to the recipient company's commercial activities does not entail direct involvement with how the services are provided. Instead, this is a specific "business program" in which the services are introduced as a means for the completion of such program. Coordination must not exclude the autonomy of the service provider with respect to the choice of the specific means or forms used for performing the services.

With respect to schedules, subordination exists even if such schedules can be agreed upon by the parties. However, once they have been set up, the service provider cannot change them unilaterally and must comply with them as originally agreed.

It is also important to bear in mind that case law has allowed a "lifting of the corporate veil" to reveal the existence of co-employers who are jointly liable before employees and entities related with labor issues, such as the Social Security Agency (CCSS). There have been cases in which companies outsourcing their services have been proven to give direct orders to their subcontractors' employees. In these cases, Costa Rican courts have ruled—contrary to what had been traditionally considered—that the recipient of the services must be considered a co-employer sharing the same liabilities that the contractor has before its own employees. This has also happened in cases in which the company acting as employer is a subsidiary of a foreign company and it is proven that the employees receive direct orders from the parent corporation.

In general terms, there are elements that can be introduced in the contract (and to be effective, should be present in the actual provision of the services over time) to try to characterize the services as not being provided with subordination. For example, subordination will not be found if the service provider:

- works on his or her own;
- bears the risks associated with his activities;
- is liable before the law for any illegal actions he or she may incur in while providing the services;
- pays his or her own social security, taxes, etc.;
- hires his or her own employees, if any;
- works independently for another employer;
- has the capacity of selecting a replacement for him or her;
- provides the services in a place or places not imposed by the service receiver; or
- does not get necessary instruments, tools, or materials from the service receiver.

Further, although by themselves, their existence or nonexistence will not rule out or imply the appearance of a labor relationship, the following elements would be evaluated by a local Court of Law when evaluating the existence of an employment relationship:

- exclusivity (as opposed to the possibility of providing services for other parties);
- place of work under employer's control;
- periodic and fixed payment;
- submission to hourly shifts and schedules;
- the worker's/employee's ability to accept or reject rendering specific services;
- provision by the employer of the material and personal means needed to perform the services;
- registration before the Costa Rican Social Security Agency; and
- the length and continuity of the service relationship.

§ 1.6

F. What are the most important characteristics of the legal culture relating to employment?

The main characteristic of the Costa Rican legal system is that it is very protective of employees. This protection stems from the fact that the employee is usually the weaker of both parties within the labor relationship. Probably the two most important principles slanting the law in favor of the employee are the principles of “reality contract” (also known as “supremacy of reality”) and the principle known as “*in dubio pro operario*.”

Under the *reality contract* principle, any terms or conditions governing the labor relationship, as long as they are more favorable for the employee, become part of the relationship and shall be considered as the true conditions over any that may have been agreed upon in writing. Simply, all rules in a labor relationship are to be interpreted in favor of the employee (i.e., real work schedules versus contractually agreed work schedules; actually paid salaries and compensations versus contractually agreed compensation; etc.).

Under the above-mentioned principle, neither a contract's contents, nor how it is labeled by the parties, are important. Labor Courts find that employers frequently use several mechanisms to avoid the application of labor law, giving the contract the appearance of a nonlabor matter. In the end, what matters is what actually happens in practice.

Under the second principle (“*in dubio pro operario*”), judges and courts of law are obligated to resolve any issue in favor of the employee. In consequence, if in a conflict the employee makes a statement and the employer states the opposite, the judge must rule in favor of the worker, as long as there is no other contradictory categorical proof. Further, even in the event of both parties filing evidence in support of their positions, if there is no doubt of the legitimacy of the evidence, the judge must rule in favor of the employee.

Finally, Costa Rica may be considered as a nonlitigation-oriented society. With respect to labor disputes, this generalized attitude, in addition to the fact that labor lawsuits take very long to be resolved and the existence of conciliation, reduce the occurrence of litigation.

§ 2

II. HIRING

§ 2.1

A. Must a foreign employer set up a local entity to employ local workers, and if so what are the requirements?

No, it is not necessary for a foreign employer to set up a local entity in order to hire local workers. However, it is advisable to do so to shield the parent company from liability related to any labor-related responsibilities or obligations. Further, from a practical standpoint, the creation and use of a local entity is much easier and is strongly advised.

Absent a local entity, the employer can still set up a branch in Costa Rica. For such purposes, several requirements must be fulfilled in accordance with Article 226 of the Code of Commerce. Nevertheless, if the company is not interested in setting up a branch, another option is to grant and register a power of attorney for an individual to represent the foreign company in Costa Rica. By fulfilling the requirements established in Article 232 of the Code of Commerce, the holder of the power of attorney will be able to represent the foreign employer in all necessary proceedings and may become an employer and hire people.

If the foreign employer does decide to set up a local entity to serve as a local employer, that can be done quite easily. First, the foreign employer must decide whether the structure of the local entity shall be of a “*Sociedad Anónima*” or of a “*Sociedad de Responsabilidad Limitada*.” In the *Sociedad Anónima* (S.A.) the positions of President, Secretary, and Treasurer are legally mandatory and must be occupied by three different individuals. Therefore, the S.A. must have a Board of Directors of at least three members, as well as one Comptroller, who must not hold any powers of attorney on behalf of the company.

The *Sociedad de Responsabilidad Limitada* (S.R.L., “*Limitada*,” or “*Ltda.*”) is a simpler

structure than the *Sociedad Anónima* and, in most cases, when its legal treatment has gaps on concepts or does not regulate them at all, it fills such gaps from the much broader regulations of the *Sociedad Anónima*. S.R.L.'s are generally used if any of their special features are appealing to the investor, primarily: (1) shares cannot be transferred to non-shareholders without the previous express consent of the other shareholders, who have a right of first refusal to purchase them; and (2) they require, for their administration, no more than one individual (manager). This is an especially appealing structure for situations in which the investor does not want to use and register (thereby making public) the names of additional individuals to form part of what in the S.A. would be called a Board of Directors.

§ 2.2

B. What rules apply to the employment of foreign nationals? How much time should an employer allow to obtain the required work authorization documents?

There are no special employment rules applicable to foreign citizens. Foreign nationals are entitled to exactly the same rights and benefits as local employees. The only requirement for the employment of a foreign national is for the employee to have a legal migratory status that allows him or her to work in Costa Rica. To obtain such status, the worker must obtain a *working permit* from the Costa Rican immigration authorities. In order to obtain such permit, the main requirement that the worker will be asked for (among others) is to have a labor agreement with a local company. If the worker has not been hired to work in Costa Rica, the permit will not be granted.

Based on experience, obtaining a working permit usually takes approximately six months; however, depending on the complexity of each case, it could take more than that. It is also important to note that, in the cases of companies that constantly bring foreign citizens to work in Costa Rica, it is highly recommended to comply with the “Company Recognition” proceedings. This regime allows companies under certain categories to be granted a special authorization to obtain residencies for its foreign employees. After complying with this proceeding, the residency will be linked with the company. This makes obtaining a working permit a much simpler proceeding that usually takes about two to three months. Obtaining the “Company Recognition” status usually takes about two months.

Nevertheless, not all companies are eligible to be granted the “Company Recognition” status. In case a company is interested in obtaining such status, it is first convenient to verify if it is among the categories of companies eligible to be recognized by Immigration.

§ 2.3

C. What rules apply to background checks?

Under Costa Rican law there are no limitations forbidding an employer from asking for background checks or criminal records certificates prior to hiring someone. However, the decision not to hire a certain individual cannot be based on the individual's background as this can be considered an act of discrimination.

In Costa Rica, criminal record certificates only show if the applicant has been convicted of a felony. The only freedom or right limited by a criminal ruling is the right of moving freely within the Costa Rican territory and out of it. Consequently, refusing to hire an individual due to a criminal conviction may be interpreted as an illegal imposition of an extra punishment. In sum, the criminal background check can help an employer decide whether or not it wants to hire a certain individual, but it cannot be the only justification for not hiring that person.

Another important issue to consider is the fact that criminal record certificates are only issued to the individual whose background is being certified. That considerably limits the ability of the employer to obtain the background checks.

Finally, it is also important to mention that if a previously convicted employee provides a forged background certificate showing no criminal record, the employer is entitled to terminate such employee without sustaining any kind of liability. However, such termination will not be based on the existence of criminal records but on the employee having provided false information to the employer at the time of hiring.

§ 2.4

D. What rules apply to medical examinations or health-related tests?

Just as with background checks, an employer can request medical examinations, either for the purposes of hiring someone or during the labor relationship. However, refusing such examination cannot be the sole cause for refusing to hire someone. Also, depending on the circumstances, an employee could be penalized if he or she does not comply with a medical examination requirement by the employer as it is his or her obligation to submit to medical examination when the employer requires it; however, each case has to be analyzed individually in order to determine what kind of penalty or sanction is applicable

With medical examinations, as with background checks, if the employee provides the employer with false medical information prior to being hired, the employer is entitled to terminate the employee without liability for the provision of false information. This is especially true if it is later proven that the employee had a condition prohibiting his or her ability to duly perform employment duties.

§ 2.5

E. May an employer require drug and alcohol testing?

The employer may require drug and alcohol tests. However, as in the cases mentioned above, the refusal of an employee to take such tests cannot substantiate termination.

The employer would be entitled to terminate an employee if it is proven that such individual provided false information about drug and alcohol use. Further, the employer is entitled to terminate an employee without liability if the employee is caught working under the influence of alcohol or of any other illegal substance.

§ 2.6

F. Are there mandated preferences in hiring?

As mentioned in § 1.1(a) above, Article 68 of the Costa Rican Constitution states that, under equal circumstances, Costa Rican workers shall be preferred.

§ 2.7

G. Are there mandated sources for recruiting employees, such as local labor authorities, agencies, or to recruit from within an existing workforce preference in hiring?

There are no mandated sources for recruiting employees. The only rule is that, under equal conditions, hiring of Costa Rican workers must prevail over hiring of foreign workers.

§ 2.8

H. Are there requirements to advertise or post openings in particular places?

There are no such requirements in Costa Rica.

§ 2.9

I. Are there restrictions on filling openings with contingent workers?

As mentioned above in § 1.5, Costa Rican labor law does not define the term contingent worker; however, to fill an opening, an employer could hire someone as an employee to perform certain specific tasks or to work for a limited amount of time, as long as it is for less than one year.

§ 2.10

J. What are the consequences of misclassifying a worker as an independent contractor, contingent worker, or temporary worker?

When a worker is misclassified as an independent contractor instead of as an employee, there may be four main consequences:

1. The employer may be forced to retroactively pay the CCSS (Costa Rican Social Security Agency) all payments that were not made during the contractual relationship between the recipient of the services and the services provider.
2. The employer may be forced to pay the income taxes that the employer was supposed to withhold from the employee's salary.

3. The employer may be compelled to retroactively pay the employee all unpaid labor-related benefits, such as vacations and Christmas bonuses, among others.
4. Upon termination, the employer would be obligated to pay severance and to give notice (or pay in lieu of notice) if termination should be without just cause.

Concerning contingent workers, as mentioned above, Costa Rican law does not include such type of employment.

With regards to temporary workers, mislabeling a permanent worker as a temporary one should make no difference as both have the same rights. Notwithstanding, under Costa Rican labor law, someone who has been hired as a temporary worker must be considered a permanent worker after a year of working for the same employer, regardless of what the written contract states.

§ 3

III. EMPLOYMENT CONTRACTS

§ 3.1

A. Are written employment contracts required for certain employees?

With the exceptions included in Article 22 of the Labor Code (agricultural workers, domestic workers, temporary workers, and workers hired for a specific task), labor agreements must be executed in writing. Further, it is also appropriate to make sure that such written agreements reflect the real terms and conditions of the labor relationship so that none of the parties may prove otherwise. Since reality supersedes any written or verbal agreement, in order to avoid any possible liability, the written agreement must be clear enough as for any of the parties to understand at any time what the actual conditions of employment are. Further, if such conditions should change over time, it is recommended to document such changes in writing. It is also advisable for both parties to sign the records proving their acknowledgement and acceptance of the modifications.

Finally, although the Labor Code requires most labor contracts to be written, in the case they are not, the labor relationship will still be deemed to exist.

§ 3.2

B. Are there certain essential terms in employment contracts?

Article 24 of the Labor Code establishes the basic required elements for all labor agreements. These elements are:

1. first and last names, citizenship, age, gender, marital status, and full addresses of the parties;
2. I.D. numbers of both parties;
3. if the employee shall be forced to move by reason of his or her employment to

another location, the new domicile must be clearly indicated;

4. term of the contract or, if it is for an indefinite period of time, indication of such circumstance;
5. information concerning the shifts during which the employee will be rendering his or her services;
6. salary and terms of payment;
7. place or places in which the employee will be obligated to render his or her services;
8. any other stipulations the parties may have agreed upon;
9. the date and place of execution of the contract; and
10. signatures of both parties.

§ 3.3

C. In what language(s) must employment contracts be written?

The Costa Rican Constitution establishes that Spanish is the official language in Costa Rica. Consequently, labor case law and practice specifically indicate that all labor contracts must be written in Spanish.

§ 3.4

D. What rules exist relating to the duration of employment contracts?

The duration of labor agreements is generally deemed to be indefinite, unless the nature of the services rendered requires a finite term or the agreement involves the provision of certain specific services. If an established term is greater than one year, the contract is considered to be for an unlimited period of time, with the exception of certain cases requiring specialized technical training. Also, if the employee continues working for the same employer after the completion of services for which the employee was hired, the labor relationship will be deemed employment for an unlimited period of time.

§ 3.5

E. Are probationary periods allowed, and if so, what restrictions apply?

Costa Rican law allows for a probationary period at the beginning of a labor relationship. This probationary period cannot last longer than three months. During this period, the employee can be terminated without liability for the employer.

§ 3.6

F. Must employment contracts specify termination provisions, and if so, with what degree of specificity?

Under Costa Rican law, employment agreements are not required to include any termination provisions. In Costa Rica, any employee can be terminated at any time, and any employee can resign at any time. What makes the difference is if the termination or resignation is with or without just cause. Specifying in the employment contract certain behaviors as serious faults or breaches of the contract is convenient in order to be able to terminate an employee with just cause. Article 81 of the Labor Code establishes the causes of termination without liability for the employer (*termination with just cause*). In such cases the employer will not be obligated to pay severance and to either give or pay notice to the employee. After mentioning several causes of termination, Labor Code article 81, paragraph 1 states that an employee can be terminated in cases of serious faults or breaches of the contract. Thus, it is important for an employer to define what it considers as a serious fault or breach of the contract. One must be careful not to consider just any fault as serious, since the penalty of termination must be proportional to the breach or fault.

If, on the other hand, the employer decides to terminate an employee and the cause of termination is not included in Article 81 of the Labor Code, then the employer can proceed with the termination, but must pay the employee severance and, depending on the case, pay for the notice period as well.

Regarding the severance payment, depending on how long the employee has rendered his or her services to that specific employer, it could range between seven and 22 days of salary per year of labor with an eight-year cap.¹ This payment is intended to serve as compensation to the worker for the time the worker should remain unemployed; however, it must be paid even if the employee, upon his or her termination, starts working immediately for another employer.

Notice refers to the amount of time (term) that the employer must give to the employee before the termination becomes effective. During this term the employee will remain working and is entitled to one day off per week to attend interviews and/or to look for another employment. Such term may be of one week, two weeks, or one month, depending on how long the worker has been employed. However, the employer has the option of not granting such term and paying for it if the termination should become effective immediately. If that is the case, the employer would be obligated to pay the employee one week, two weeks, or a month of salary to the employee, depending on how long the worker has remained employed.

If the employee resigns, the general rule states that the employer has no liability, thus has no obligation to pay severance nor to give or pay notice. Nevertheless, Article 83 of the Labor Code establishes certain cases in which the employee is allowed to resign without losing the right to receive severance and notice payments. In such cases, such resignation is known as *resignation with employer's liability* and such liability is due to the employer causing certain situations in which the employee is forced to resign.

¹ See discussion at § 14 below.

§ 3.7

G. Do employment contracts customarily contain covenants to safeguard an employer's intellectual property, covenants not to compete, and/or agreements to not solicit the employer's customers or employees?

It is not required by law to include covenants to protect the employer's intellectual property; however, when it is considered necessary, such provisions are highly recommended and can be included.

Concerning covenants not to compete, not only are they not mandatory, they are also not common. Further, these covenants are very hard to enforce by the employer if breached by the employee. Therefore, if a noncompete clause is included, it is recommended to establish a liquidated damages clause with a substantial fixed indemnification for breach. This serves as a deterrent for competing practices.

On the other hand, if a covenant not to compete is included in the labor agreement, the employer is obligated to indemnify the employee for the restrictive period following the termination of the labor relationship. Case law has established such indemnification in an amount equal to 50% of the salary the employee would have received during such period if the employee would have remained employed. This does not mean that in all cases the indemnification must be for 50% of the salary. Instead, the parties may agree on a different amount or on a lump sum. However, such indemnification must be reasonably related to the employee's salary. This indemnification can be paid during the labor relationship or at the end of it.

Finally, with regard to nonsolicitation agreements, as in the cases mentioned above, these not only are very uncommon and not required by law, but also are very hard to enforce. These covenants can be included, but if they are breached, there is little the employer could do to repair or to obtain indemnification for the damages caused by such breach.

§ 3.8

H. Are the terms of employment contracts considered confidential?

Whether the terms of an employment contract are confidential or not depends on what the parties agree. Labor agreements are not considered public, as they are executed privately between the parties. However, if the parties do not agree to keep them confidential, they can disclose their contents to any third parties. It is also important to bear in mind what is stated in § 11.1 below regarding privacy issues.

No limitation can be established to prevent the employee from sharing the contents of his or her employment contract if such disclosure is necessary to allow the employee to defend his or her rights when such rights are breached by the employer.

§ 4

IV. DISCRIMINATION IN EMPLOYMENT

§ 4.1

A. What prohibitions against discrimination exist, and how are they defined?

Generally, all types of discrimination are forbidden in Costa Rica as the Constitution states all individuals are to be considered equal. The following statutes are applicable in cases of discrimination:

- Law for Equal Opportunities for Disabled Persons, Law No. 7600 and its Regulations;
- Free Trade Agreement between the United States, Central America and the Dominican Republic (CAFTA), Chapter 16, Article 16.8;
- Constitution, Articles 33 and 68;
- Code for Childhood and Teenagers, Article 93;
- Law for the Promotion of Real Equality For Women;
- Law for Senior Citizens, Article 4, paragraph (a);
- Declaration for the Elimination of Discrimination against Women;
- Convention for the Political Rights of Women;
- Approval of the Additional Protocol to the American Convention on Human Rights Regarding Economic, Social and Cultural Rights (“Protocol of San Salvador”), Article 3;
- American Convention on Human Rights;
- Inter-American Convention for the Elimination of All Forms of Discrimination Against Disabled Persons;
- Convention Do Belem do Pará;
- International Treaty on Civil and Political Rights;
- Universal Declaration on Human Rights;
- International Treaty of Economic, Social and Cultural Rights;
- UN Convention for the Elimination of All Forms of Discrimination Against Women;
- Approval of the Ibero-American Convention on the Rights of Youth;
- General Law on HIV-AIDS and Regulations;
- Law on Sexual Harassment in Employment and Education;
- Regulations for Hiring and Health Conditions for Teenagers;
- Agreement of Equality of Remuneration;
- Agreement on the Discrimination (employment and occupation); and

- Labor Code, Title 11.

§ 4.2

B. What prohibitions exist against religious discrimination, and what accommodations of religious practices are required of the employer?

As mentioned above, under Costa Rican law all kinds of discrimination are prohibited; however, there are no specific provisions regarding religious discrimination. Also, employers are not required to provide any accommodations for different religious practices.

§ 4.3

C. What prohibitions exist against disability discrimination and what accommodations of disabilities are required of the employer?

The Costa Rican Constitution mandates that all people are considered equal in accordance with the law and that no discrimination shall be allowed. In addition, the Constitution establishes that everyone has the right to work and to move freely within the national territory, which includes the workplace. Thus, the Constitution effectively requires employers to guarantee access to the work premises for any disabled person.

In addition to the above, Law No. 7600, which is the Law for Equal Opportunities for Disabled People, states that everyone has the right to be employed and that, if a person meets all requirements for a certain position, the employer may not deny the possibility of applying for such employment and may not refuse to hire an individual solely by reason of a disability.

Furthermore, all employers must guarantee access to all premises for handicapped employees to allow them to have access to work opportunities. Alleging that there are not enough facilities to allow a handicapped worker access to certain areas of his or her workplace could be considered as a type of discrimination. For instance, the lack of access ramps may not only limit mobility of handicapped employees, it may also mean that certain people may not be able to work for a company or in certain positions regardless of their aptitudes or capabilities.

Also, if a company has handicapped employees and one of them suffers an accident due to insufficient mobility conditions, the employer would not only be liable for such accident, but could also be criminally responsible for the injuries suffered by the employee.

To establish whether there has been discrimination or segregation of handicapped people, or to be punished for not having all the necessary conditions to allow access or mobility of handicapped people within the work premises, at least one of the following circumstances must be present: (1) the premises are open to the public (i.e., stores, supermarkets, shopping malls, government offices, etc.); (2) there are actually handicapped employees working for the company or someone was in fact, at some point, impeded from applying for a job because of the lack of proper conditions or facilities; and (3) an acci-

dent has indeed occurred. In sum, it is necessary for someone to be affected by a lack of proper facilities for the company to be at risk of liability. Nevertheless, even in cases where no one has been affected, the lack of access ramps or proper accommodations, represents a latent risk for the employer and a potential breach of the law.

Employers are required to maintain certain facilities on their premises in order to assure proper access to disabled individuals. In addition to ramps, employers must also have public phones installed at a maximum height of one meter, as well as special sinks and toilets, security fences, and handrails, among others.

Further, all employers must make sure that all conditions to allow access and mobility of disabled people are met within their premises. If the building was built before 1996, when Law No. 7600 became effective and enforceable, employers had a ten-year term in which to make the necessary structural modifications to allow access and proper mobility for disabled people.

The Ministry of Labor monitors compliance with all required employment accommodations for disabled people. However, in case of breach of the law, any individual has the right to file a complaint before the Citizens Defense Bureau (“*Defensoría de los Habitantes*” or “Ombudsman”), the Constitutional Court, or the Labor Courts.

§ 4.4

D. What prohibitions are there against harassment?

The prohibitions against harassment are established by the Law on Sexual Harassment in Employment and in Teaching. The target of this law is “to prohibit and to penalize sexual harassment as a discriminatory practice by reason of gender against the dignity of women and men, in labor relationships and in teaching activities.” In that respect, any acts of discrimination based on gender, as well as any actions of sexual content and/or actions intended to obtain sexual favors from, or to sexually harass, someone, may be considered sexual harassment and may even cause immediate termination of the labor relationship.

Depending on the source of the harassment, such termination may be with or without employer’s liability. If the employer or the employer’s representative is the harasser, the employee shall be entitled to terminate the labor relationship with the employer’s liability. If, on the other hand, it is an employee who is caught harassing another employee or individual, the employer may terminate the labor relationship without any kind of liability for the employer.

Also, if certain sexual harassment actions include sexual abuse such as molestation and/or rape, the harasser may be criminally liable and, in some cases, the employer may be also found civilly liable for the damages caused to the victim.

§ 4.5

E. What exceptions are permitted to the prohibitions against discrimination (e.g., job requirements that mandate hiring candidates of a certain age or gender, or quotas to address past discrimination)?

There are no exceptions permitted.

§ 4.6

F. What are the potential remedies for prohibited discrimination and harassment?

Employers must implement comprehensive policies in order to resolve or prevent any conflicts involving discrimination and/or harassment. Nevertheless, in case of a complaint, the procedures discussed in § 1.4 above are fully applicable.

§ 4.7

G. What prohibitions exist regarding retaliation/reprisal?

Article 14 of the Law against Sexual Harassment in Employment and Teaching establishes a guarantee for the informer and witnesses:

No person who should have denounced a victim of sexual harassment or that should have appeared as witness of the parties, should suffer, for such reason, any personal damage, neither in his employment nor in his studies.

Additionally, to avoid possible countermeasures, another provision guarantees protection for the informer, so that such person can only be terminated by means of a process or request of authorization for dismissal that the employer must make before the General Direction of Labor Inspection of the Ministry of Labor. The employer must reliably demonstrate the commission of a serious offense that legitimizes the informer's dismissal without responsibility.

§ 4.8

H. May individual persons be liable for discrimination, harassment, or retaliation/reprisal?

Yes, individual persons may be liable for discrimination, harassment, retaliation, or reprisal. In fact, claims for sexual harassment, moral harassment (mobbing), discrimination, or retaliation or reprisal must be filed by identifying the specific individual who committed them. This should occur even though a claim may also be filed against the company for not applying due procedure and for not guaranteeing the workers an environment free of the above-mentioned pressures.

§ 5

V. COMPENSATION

§ 5.1

A. What restrictions are there on hours that may be worked?

There are three kinds of shifts contemplated in the Labor Code:

- **Day Shift:** Work performed between 05:00 hours (5:00 a.m.) and 19:00 hours (7:00 p.m.).
- **Night Shift:** Work performed between 19:00 hours (7:00 p.m.) and 05:00 hours (5:00 a.m.).
- **Mixed Shift:** Work that includes periods of time comprising both the day shift and the night shift.

According to Article 136 of the Labor Code, the ordinary day shift cannot exceed eight hours per day, the night shift cannot exceed six hours per day, and the mixed shift is limited to seven hours per day.

A mixed shift that exceeds three hours and 30 minutes after 19:00 hours (7:00 p.m.) shall be considered a night shift for all legal effects.

Article 136 additionally establishes that weekly, ordinary work time cannot exceed 48 hours for day shifts, 42 hours for mixed shifts, and 36 hours for night shifts.

§ 5.2

B. What minimum wage requirements exist?

Article 177 of the Labor Code provides that minimum wages should be established periodically for the private sector.² There is a National Wage Council composed of government representatives of the employers and of the employees.

The Council recommends percentages of adjustment to match increases in the cost of living. The recommendation is not binding. However, it is usually followed by the government when enacting the corresponding decree, which is binding and published every six months.

§ 5.3

C. What is the required schedule for paying wages, and in what form and currency must they be paid?

Remuneration can be agreed either by unit of time (month, week, day, or hours); by unit or by work; by task or duty, or even by participation in profits, in sales, or in collections.

² In Costa Rica, there are different categories of minimum wages for different categories of workers. All minimum wages are revised and increased every six months.

The timing of payment are freely established, but cannot be more than 15 days for blue-collar workers or one month for white-collar workers or household aides.

Irrespective of the method, salary cannot be less than the minimum established by law. Payment of wages can be made in local or foreign currencies, as long as the parties have accepted this at the place of work. This is done generally by cash, company checks, or wire transfer.

§ 5.4

D. What overtime pay requirements exist?

Any amount of time worked by any employee exceeding the limitations stated in § 5.1 above, for each kind of shift shall be considered as an *extraordinary shift*,³ and must be paid with an additional 50% of the regular salary.

In addition, payment for six hours of the night shift must be equivalent to eight hours of pay for the day shift.

Ordinary and *extraordinary* work cannot jointly exceed 12 hours per day (with the exception of *force majeure* or emergency cases in which it is critical for the business that employees keep working the time necessary as to overcome such circumstances).

Managerial positions, discontinuous or intermittent tasks, and work that by its nature cannot be performed at regular hours (i.e., tasks performed by agents compensated by commission) are excluded from the maximum hour limitations. However, no individual can be required to work for more than 12 hours per day against his or her will, except under special circumstances.

§ 5.5

E. What rules apply to the payment of commissions?

In Costa Rica, the worker's salary can be agreed and paid by participation in profits, sales, or collections of the employer. Thus, commissions must be considered as a type of salary (participation in sales or collections) and, as such, they are governed by the same rules. This means that commissions must be reported to Social Security, are subject to all legal deductions and tax payments, and must be taken into consideration for the calculation of the Christmas bonus, vacations, and other labor rights.

Relating to this, the Second Chamber of the Supreme Court of Justice has stated:

As for the latter form of payment, based on sales or collections, it is normally paid by percentages, or with a fixed sum, for every sale or collection achieved; and the amount paid is given the name of commission. Article 168 of the Labor Code establishes that: "if the salary will consist of participation in profits, sales or collections of the employer, there should also be a separated amount to be paid to the worker, which will be proportionate to the needs of the worker and to the probable total of the profit that will correspond to him. The final liquidation will be made at

³ In Costa Rica, the term "overtime" is not used.

least once a year. Such a norm undoubtedly tries to protect the worker whose salary is paid based on profits, sales or collections, in such a form that he perceives in a periodic form a sum that allows him to face his expenses, although the final liquidation is made afterwards.”⁴

§ 5.6

F. What bonuses are mandated or customary?

A Christmas Bonus must be paid within the first two weeks of December and corresponding to work performed up to November 30 of each year. Employers must pay each employee a bonus of one month’s salary after a year of work (this bonus is called “*aguinaldo*”), or an amount proportionate to the time worked, if it is less than a year.

Additionally, if at the moment of hiring or during the labor relationship it has been agreed or instituted as practice to pay other types of bonuses, these are considered to be vested rights and remain incorporated into the conditions of work. Consequently, they are mandatory.

The rules applicable to salary are also applicable to bonuses; hence, they must be reported to Social Security and are subject to all legal deductions, etc.

§ 5.7

G. What special rules exist for stock options or stock grants?

The law has no specific outlook on this topic. There is very little case law on the issue.

In general terms, upon employment termination, vested stock options may be exercised, unvested ones may not be. Vested stock options and stock grants can be also added to base salary for the purposes of calculation of salary-related benefits and payments.

§ 6

VI. TIME OFF FROM WORK

§ 6.1

A. What public, statutory, or national holidays are required and what are the requirements if employees work on a holiday?

Holiday	Date
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⁴ Second Chamber of the Supreme Court, Ruling No. 534 (2005).

• New Year's Day	January 1
• Battle of Rivas	April 11
• Easter Thursday and Friday	Dates vary yearly
• Labor Day	May 1
• Annexation of Guanacaste	July 25
• Day of the Virgin of the Angels	August 2
• Mother's Day	August 15
• Independence Day	September 15
• Day of the Meeting of Cultures	October 12
• Christmas	December 25

When April 11, July 25, and October 12 are on Tuesday, Wednesday, Thursday, or Friday, the corresponding holiday is moved to the following Monday. Nevertheless, if the company's or entity's major activity takes place on Saturdays and Sundays, or if because of the nature of their activities they could neither stop nor interrupt operations on a Monday, the employer, with previous acceptance of the employees, must indicate the day in which the holiday will be enjoyed, within a maximum term of 15 days.

Employees who are not Catholic may request that their employer grant the days corresponding to the religious celebrations of their faith as days off and the employer will be required to grant them. When this happens, the employer and the worker must agree on the day that will be substituted for this time off, which could be part of the yearly vacations.

When an employee works on a holiday, the basic rule is that the employee must be paid double for that day. This does not mean that the employer is allowed to make employees work on holidays. It is the employer's obligation to allow employees to enjoy the above-mentioned holidays; however, when circumstances should demand that the employee work on a holiday and the employee agrees to, the employer must pay double for that time.

§ 6.2

B. What are the requirements for short-term sick pay, and who pays it?

Depending on the regime that covers them, sick leaves and disabilities are divided in two types—the ones granted by the Costa Rican Social Security (CCSS) and the ones granted by the National Insurance Institute (INS). The ones that are granted and paid by the CCSS are generally temporary and related to illnesses, pregnancies, and/or common accidents. The ones paid by the INS generally derive from labor-related illnesses or accidents usually occurring at work.

Concerning the disabilities granted by the CCSS, the rules governing them are as follows:

- **From one to three days of disability:** The employer pays 50% of the salary and CCSS makes no payment.
- **From four days of disability and greater:** The CCSS pays up to 60% of the average income reported by the employer to such entity during the last three months prior to the disability, or of the salaries that were used as a base for the contribution to the CCSS (Article 36 of the Regulations for Health Insurance of the CCSS). From the fourth day on, the employer is not obligated to pay anything.

Article 19 of the Technical Rules for the Risks of Work Insurance controls disabilities granted by the INS. The main rules are as follows:

- **Temporary disability:** During temporary disability term, the worker has the right to a subsidy equal to 60% of his or her daily average salary.⁵ This applies to the first 45 days of disability. After this term, the subsidy that is allocated to the worker will be equivalent to 100% of the minimum wage applicable at the time, plus 67% of the excess difference that results from the daily average salary and the minimum wage. The recognized wage subsidy will never be lower than the minimum wage, nor will it be greater than 100% of the worker's daily salary.
- **Minor permanent disability:** The declaration of minor permanent disability establishes for the worker the right to receive an annual revenue, payable in 12 installments, for a term of five years, which will be calculated by applying the fixed percentage of loss of general physical or mental capacities (in accordance with the terms of the Article 224 of the Labor Code) to the *average annual salary* determined in accordance with Article 235 of the Labor Code.
- **Partial permanent disability:** The declaration of partial permanent disability grants the worker the right to receive an annual revenue, payable in 12 installments per year, for a term of ten years. This revenue is equivalent to 67% of the average annual salary.

The above-mentioned term may be extended for successive terms of five years, if by technical means⁶ it is demonstrated that the beneficiary: (1) is more than 40 years old; (2) depends exclusively on the revenue for his or her subsistence; and (3) has not received any other income during the last year.

Since July 1, 2005, the *minimum monthly revenue* corresponding to this kind of disability is Costa Rican Colones (CRC) 64,352.

- **Total permanent disability:** The declaration of total permanent disability grants the worker the right to receive a revenue for life, payable in 12 installments per year. This revenue is equivalent to 100% of the applicable minimum yearly sala-

⁵ The *daily average salary* is the result of adding the salaries that the worker has received for a certain period of time, then dividing the result by the amount of months that is being included and then dividing the result by 30. For instance, if it is required to calculate the average daily salary of the last six months, the way to calculate it would be by adding all the salaries that the worker has received for the last six months, dividing the result of such addition by six, and then dividing that result by 30.

⁶ *Technical means* is defined as research by social workers and other experts to determine if such requirements are actually met.

ry, plus 67% of the excess of the average yearly salary determined with respect to the minimum yearly salary.

Since July 1, 2005, the *minimum monthly revenue* corresponding to this disability is CRC 96,048.

- **Big disability:** The declaration of “*Gran Invalidez*” or big disability⁷ determines for the worker the right to receive a revenue for life, payable in 12 installments per year. This revenue is equivalent to 100% of the current minimum yearly salary, plus 67% on the excess of the average yearly salary determined with respect to the Minimum Legal Yearly Salary.

Since July 1, 2005, the *minimum monthly revenue* corresponding to this type of disability is CRC 96,048.

In addition to the above, a monthly fixed amount, CRC 54,662, must also be paid to the worker.

Finally, Law No. 7756, which regulates benefits for individuals taking care of patients in their final stages, grants a license or leave of absence⁸ for such purposes as long as the caretaker is not making any profit from such activity. The license in these cases is granted for a maximum term of six months and can be subject to revision or extension by the doctor in charge of the patient every 30 days.

The corresponding subsidy shall equal 60% of the average salaries reported to CCSS within the last three months prior to the license being granted.

§ 6.3

C. What are the requirements for paid vacation or annual leave?

Article 153 of the Labor Code establishes the right to paid vacations/annual leave as follows:

Every worker has the right to annual paid vacations, whose minimum is two weeks for every fifty weeks of continuous work for the same employer.

In case of termination of the labor contract, before completing the period of fifty weeks, the worker will have the right to a minimum of one day vacation for every month fully worked, which will be paid to him/her at the moment of termination.

Article 158 of the Labor Code states that workers should enjoy uninterrupted vacation time. Vacations can be divided only in two portions, when the parties agree to do so, and provided that the specific work does not allow a long absence.

⁷ *Gran Invalidez* is when the worker not only suffers a total permanent disability but also requires the assistance of another person for all of his or her needs.

⁸ Please note that in Costa Rica the term “license” is used, as opposed to the term “leave of absence” as used in the United States.

Further, Article 159 of the Labor Code generally forbids the accumulation of vacations. Accumulation can only be done for one term if the employee cannot easily be replaced or when his or her family lives in another Province.

§ 6.4

D. May the employer mandate when vacation/annual leave is taken under any circumstances (e.g., year-end shutdown, furlough, prohibitions on vacation use in busy periods)?

The Costa Rican labor code states that the employer is the one who decides when the employee must enjoy his or her vacations. Additionally, the employer is obligated to grant vacations to employees within 15 weeks following the employee's completion of 50 weeks of labor.

§ 6.5

E. What requirements exist for paid or unpaid maternity and paternity leave?

Regarding maternity licenses or leaves of absence, Article 95 of the Labor Code grants a four-month license to pregnant workers giving birth to their children. In principle, such license should start one month before the date of birth and should finish three months after the date of birth. The last three months of the license are also considered as the minimum breast-feeding license, which can be extended by medical recommendation.

During the license, the system of remuneration will be ruled according to the policies of the CCSS regarding the "Risk of Maternity." This remuneration must be calculated according to all labor rights derived from the corresponding labor agreement. The payment of this license must be equivalent to the salary of the worker and it must be covered, in equal parts, by the CCSS and by the employer. Also, in order not to interrupt the contribution (to the CCSS) during this period, the employer and the worker must contribute according to the totality of the salary earned during the license.

Also, a worker who adopts a minor will enjoy the same rights and the same three-month license as the pregnant and breastfeeding worker. This allows for a period of adaptation. In cases of adoption, the license will begin the immediate day following the date in which the minor is delivered. To enjoy the license, the adoptive parent must file a certificate issued by the National Patronage for Childhood (PANI) or the corresponding Family Court in which the adoption procedure is processed.

There is currently no law establishing a paternity license, but it is customary for companies to grant a license without salary for some days. If there is no such license, a father may request vacation for that purpose.

§ 6.6

F. What requirements are there for new mothers (e.g., part time work, breaks for breast feeding, day care)?

Article 97 of the Labor Code establishes that:

Every mother in her breastfeeding period must be granted, in the place of work, a period of 15 minutes every three hours or if she prefers it, half an hour twice per day during her work shift, in order to nurse her child, except in cases in which by means of a medical certificate it is demonstrated that she needs less time to do so.

The employer will also try to grant her resting time within the possibilities of her work, which will have to be calculated as time of effective work, just as in the case of the intervals mentioned in the previous paragraph, all for remuneration effects.

§ 6.7

G. What requirements exist for paid or unpaid medical leaves of absence, and how do these differ from short-term sick pay?

Costa Rican law does not differentiate between a short-term and a long-term leave of absence or disability; it just regulates who pays the employee up to certain point and who pays from that moment on (*see* discussion at § 6.2 *above*). The specific requirements to enjoy a paid medical disability license or leave of absence depend on the corresponding system of insurance, be it the CCSS or the INS. In any case, the basic requirement is a doctor's evaluation of the respective system, who must extend a certificate of disability.

The worker also has the obligation to present the certificate of disability within two days of the absence so he or she does not incur an unjustified absence (which would allow dismissal without the employer's liability).

In cases in which the medical disability is for more than three consecutive months, the employer may terminate the labor relationship by paying the worker all labor rights according to Article 80 of the Labor Code, including severance and notice.

§ 6.8

H. What are the employer's duties if an employee requests a flexible working schedule?

An employer is not obligated to accept providing an employee a flexible working schedule, especially if the employer's needs are not fulfilled with the shifts that the employee has requested. It is among the employer's discretionary rights to authorize such kind of schedules. In doing so, the employer bears the risk that the new shift may become a vested right.

§ 6.9

I. What other paid or unpaid leaves of absence must be provided by employers?

Besides the cases of absences for medical reasons, Costa Rican law establishes other situations in which the employee is allowed to leave his or her work, and, in some of such cases, get paid for such time. The following is a list of such cases:

- **To vote in elections:** Article 168 of the Electoral Code establishes the right to miss work to vote, as follows: “The workers or employees will be able to be absent from work on election day, for one hour—to be designated by the boss or superior—in order to vote and without being subject to any penalty or wage deduction.”
- **To attend a trial or court summons:** In order to testify as a witness in a judicial process.
- **To attend to medical care centers:** This is an unpaid license, because the employer’s obligation is limited. The employer may only allow this absence as necessary for the worker to enjoy the right to medical care.

Additionally, the company can establish its own guidelines for licenses, with or without payment of wage, as a complement to the existing benefits and as long as they do not offer less than what the law provides.

§ 7

VII. BENEFITS

§ 7.1

A. What benefits must employers furnish to employees?

The employer must report all workers to Social Security during the first eight days of the labor relationship for them to be covered by the system. The report to Social Security is made by the means of a monthly form, on pre-established dates, in which the basic information of identification, category, wage, and shift must be included.

The contribution to Social Security is shared between the employer and the employee. The employer covers 26% of the reported wages and the employee contributes 9% of his wage.

Also, all employers must provide a workers’ compensation insurance policy in case of an accident.

All legally established benefits such as vacations, daily resting periods, holidays, and weekly rest days are mandatory as well.

Additionally, the employer must pay the Christmas bonus during the first 20 days of the month of December, as well as any holidays during which the employee has worked.

Finally, upon termination of the labor relationship, if the termination is without just cause, the employee also has the right to receive severance pay and notice.

§ 7.2

B. What health benefits must be provided to employees (and their families), and what is the employer’s role in the provision of these benefits?

All employees are entitled to be covered with Social Security and a worker’s liability insurance policy from INS. Such benefits, especially the Social Security, cover the employees’ families as well. To provide these benefits, the employer must register itself as an employer before CCSS (Costa Rican Social Security Agency) and INS, and must report the employee and his or her salary. Also, the employer is obligated to withhold 9% of the employee’s salary (adding to that amount the duties that the employer must cover), and pay the resulting amount to CCSS. With regards to the INS worker’s liability insurance policy, the employer must also report the employee and his or her salary and renew the policy every time it expires (usually every 6 or 12 months).

§ 7.3

C. What pension contributions must be made and to whom?

The contribution to the pension regime is included in the monthly percentage paid by the employer to the CCSS. In the chart below (§ 7.4) it is identified as “IVM” corresponding in Spanish to “*Invalidez, Vejez y Muerte.*” Also, the Law for the Protection of Workers, effective March 2001, added a contribution of 1.5% for a complementary pension, which is administrated by duly authorized retirement funds.

§ 7.4

D. What percentage of overall compensation do benefits usually represent?

The detail for the distribution of contributions to Social Security is the following:

Institution		Employer	Worker
CCSS	Health	9.25%	5.50%
	IVM	4.75%	2.50%

Banco Popular		0.50%	1.00%
INA		1.50%	—
IMAS		0.50%	—
ASFA		5.00%	—
Work Capital Fund		3%	—
Complementary Pension		1.5%	—
Total		27%	9%

CCSS: *Caja Costarricense del Seguro Social* (Costa Rican Social Security Agency)

IVM: *Invalidez, Vejez y Muerte* (Disability, Elderliness and Death)

INA: *Instituto Nacional de Aprendizaje* (National Learning Institute)

IMAS: *Instituto Mixto de Ayuda Social* (Mixed Institute for Social Aid)

§ 7.5

E. What requirements exist for mandatory retirement?

Article 5 of the Regulations for the Insurance of Disability, Aging and Death, No. 6822, establishes the following:

The insured worker that reaches 65 years of age is entitled to a pension for aging, as long as he/she has contributed to this insurance with at least 300 installments. In the case of insured workers that have reached such age and do not fulfill the number of required installments, but have contributed with at least 180 installments, they are entitled to a proportional pension, as established in Article 24 of these regulations.

The insured worker will be able to get an anticipated retirement date, with the right to a pension due to age, whenever he or she completes the requirements and conditions that are indicated in the following chart:

Retirement Age	Number of Installments (Contributions) Required in Order to Retire at this Age	
	Men	Women
Years-months		

Retirement Age	Number of Installments (Contributions) Required in Order to Retire at this Age	
	Years-months	Men
59-11	-	450
60-00	-	450
60-01	-	450
60-02	-	450
60-03	-	450
60-04	-	449
60-05	-	449
60-06	-	448
60-07	-	448
60-08	-	448
60-09	-	448
60-10	-	447
60-11	-	447
61-00	-	446
61-01	-	446
61-02	-	446
61-03	-	446
61-04	-	445
61-05	-	445
61-06	-	444
61-07	-	444
61-08	-	444
61-09	-	444
61-10	-	444
61-11	462	444
62-00	456	444
62-01	453	443
62-02	450	442
62-03	447	441
62-04	443	437
62-05	439	433

Retirement Age	Number of Installments (Contributions) Required in Order to Retire at this Age	
Years-months	Men	Women
62-06	435	429
62-07	431	425
62-08	427	421
62-09	423	417
62-10	419	413
62-11	415	409
63-00	411	405
63-01	407	401
63-02	403	397
63-03	399	393
63-04	395	389
63-05	391	385
63-06	387	381
63-07	383	377
63-08	379	373
63-09	375	369
63-10	371	365
63-11	367	361
64-00	363	357
64-01	359	353
64-02	355	349
64-03	351	345
64-04	347	341
64-05	343	337
64-06	339	333
64-07	333	327
64-08	327	321
64-09	321	315
64-10	314	310
64-11	307	305
65-00	300	300

Alternatively, the insured worker that has contributed 300 installments will be entitled to a premature retirement starting at 62 years of age for men and 60 years of age for women. The above is accomplished by receiving a reduced pension, according to Article 24 of the Regulations.

Further, Article IV of the Regulations for Premature Retirement provides another possibility for premature retirement at a minimum age of 57 when the worker has contributed at least 360 installments and pays the CCSS a certain anticipation cost.

§ 8

VIII. TAXATION

§ 8.1

A. What taxes must be paid by the employer and employee, at what rates, and which taxes must the employer withhold from wages?

Besides the contributions to the Social Security System discussed above, the only tax withheld from the worker's wage is income tax. According to a percentage established on Article 33 of the Law on Income Tax:

1. a monthly income of up to Costa Rican Colones (CRC) 619,000 will not be subject to the tax; and
2. on the excess of CRC 619,000 and up to CRC 929,000, the employer must withhold 10%; in excess of CRC 929,000 per month, the employer shall withhold 15%.

The above-mentioned rules may be changed periodically by the Tax Authorities.

§ 8.2

B. Are there specialized tax or pension requirements for expatriates?

Generally, the requirements are the same as above.

§ 9

IX. INTELLECTUAL PROPERTY

§ 9.1

A. Who owns intellectual property created during the employment relationship?

Article 4 of the Law on Patents of Invention, Drawings and Industrial Models, No. 6867,

refers to the inventions made under execution of a contract for services or under a labor agreement as follows:

- When the invention is made as a product of a nonlabor contract whose object is to produce it, the patent right will correspond to the contracting party, except if agreed otherwise.
- When the invention has an economic value substantially higher than the one anticipated by the parties, at least the third part of the value will correspond to the inventor. In case the inventor considers such percentage to be insufficient, he or she will be entitled to request a valuation by a Court of Law, which cannot set an amount lower than the above indicated third.
- When a worker whose contract or labor relationship produces a certain invention, the patent right to such will belong to both parties on the labor relationship, and such right cannot be waived.
- When a worker whose contract or labor relationship does not have the object of producing an invention, the ones that the worker produces will be his or her own property. A third of the revenues that he or she obtains for this concept will be paid to the employer.
- In any other case not contemplated expressly in the previous paragraphs, the patent right will always belong to the employee.

On the other hand, Article 16 of the Regulations to the Copyrights Law No. 24611-J, establishes that:

In the works created for an individual or a corporate entity, in execution of a labor contract or in exercise of a public function, the original holder of the moral and patrimonial rights is the author, but it is assumed that, except for an agreement otherwise, the patrimonial or use rights have been assigned to the employer or the public entity, according to each case, as necessary for its common activities at the time of creation of the work, which also implies the authorization to disclose it and to defend the moral rights as soon as it is necessary for the exploitation of the same.

§ 9.2

B. What are the primary means that employers use to prevent theft of trade secrets?

Article 2 of the Law of Undisclosed Information, No. 7975, establishes the following rule:

Undisclosed information regarding commercial and industrial secrets that an individual or corporation keeps, with a confidential nature, to prevent information legitimately under his/her/its control from being disclosed to third parties, is to be protected so that it is not acquired or used by a third party without his/her/its consent, in a way that is contrary to commercial honest uses, as long as the above-mentioned information complies with

the following characteristics:

- a) To be secret, meaning that it is not, as a whole, or as a precise configuration or gathering of its components, generally known nor easily accessible for the persons in the circles where this type of information is normally used.
- b) To be legally under the control of a person who has adopted reasonable and proportional measures to keep it secret.
- c) To have a commercial value for being secret.

The undisclosed information refers, specifically, to the nature, characteristics or purposes of the products and the methods or processes for their production.

For all effects of the first paragraph of this section, the practice of breaching contracts, the abuse of confidence, the instigation to the violation of rights and the acquisition of undisclosed information by third parties that knew that the acquisition implied such practices or that, due to serious negligence, they did not know it, will all, among others, be defined as forms that are contrary to commercial honest customs.

The information to be considered as undisclosed will have to be kept in documents, electronic or magnetic means, optical discs, microfilms, movies or other similar elements.

Further, Article 7 of the same law states:

Any person that for reason of his/her job, employment, position, performance of his/her profession or business relationship, has access to undisclosed information in the terms established in the first paragraph of Article 2 of this Law and whose confidentiality has been expressly indicated to such person, shall refrain from using it or disclosing it without the owner's consent, even when the labor relationship, the performance of his/her profession or the business relationship is terminated.

In the contracts by the means of which specialized technical knowledge, technical assistance, provision of basic engineering or technologies, are transmitted, there may be confidentiality clauses to protect the undisclosed information meeting the conditions referred to in the first paragraph of Article 2 of the Law.

In addition to all of the above, it is also important to consider that there are certain behaviors that are considered breaches of rights deriving from trade secrets. Such breaches are considered felonies and carry penalties of one to three years' imprisonment. This serves as a deterrent that employers can use by warning their employees of the possible consequences they may face in case of theft of trade secrets.

Further, most breaches of the employer's trade secret rights may be considered to have caused important losses and damages to the employer. Consequently, the worker would be liable and could face a civil lawsuit.

Finally, strictly from the labor law standpoint, the Labor Code allows immediate termination of the labor relationship without liability for the employer in case a worker does not comply with his or her obligations regarding safekeeping and confidentiality of trade secrets.

§ 9.3

C. After employment ends, what restrictions exist on the employer's ability to impose covenants not to compete or covenants not to solicit customers or employees?

Non-solicitation and non-compete covenants are not that common in Costa Rica; these kind of covenants are mostly imported by foreign companies who establish activities in Costa Rica. That means that both kinds of covenants, and especially non-solicitation covenants, have not been significantly regulated. In the case of non-compete provisions, Costa Rican courts have stated that in order to enforce such covenants, the employee must have received an extra compensation; otherwise, the covenant is unenforceable and the employer could be forced to compensate the employee. From the tactical standpoint, it is generally recommended that the parties agree on a compensation payable at the end of the non-compete period so that the employee is compelled to comply in order to get paid.

With regards to non-solicitation covenants, such covenants are almost unenforceable. Generally, it is recommended to agree to a non-solicitation jointly with the non-compete obligations so that the employee is compelled to comply with non-solicitation limitations to obtain the agreed compensation.

§ 9.4

D. What duties do employees have to their present and former employers with respect to intellectual property?

Article 71 of the Labor Code establishes that:

Besides the ones contained in other Articles of this Code, in its Regulations and in its supplementary or related Laws, the following are obligations of the workers towards their employers:

- (g) To follow rigorously the technical, commercial or manufacture secrets of the products in which production they are involved directly or indirectly, or of which they have knowledge because of the work they execute; as well as of administrative reserved matters, which, if published, could cause damages to the employer.

Also, article 81, paragraph (e) of the Labor Code states that an employee can be terminated with just cause if the employee should disclose any of the information included in article 71, paragraph (g) of the Labor Code.

The above means that employees have the obligation to safeguard all of their current employer's privileged information (including intellectual property) or they can be terminated.

Further, breaches of intellectual property rights are protected by Copyright and Industrial Property Laws. Some of the violations are penalized with up to five years of imprisonment and are subject to civil complaints seeking indemnification. These laws are applicable to all people regardless of whether they are currently employed by the individual(s) or entity(ies) whose property rights were violated.

§ 10

X. CODES OF CONDUCT

§ 10.1

A. What requirements exist for a code of conduct governing employees?

Costa Rican law does not regulate codes of conduct. The only kinds of regulations that have been included and regulated in Costa Rican law are the internal working by-laws, which are subject to approval by the Ministry of Labor. This does not mean that an employer cannot establish a code of conduct.

Notwithstanding the above, there are certain basic rules that an employer must observe when producing a code of conduct. First, penalties must be reasonable and proportional to the fault that is being penalized. Second, a code of conduct can never challenge or be contradictory to what is mandated by labor laws. Codes of conduct must always be complementary to what the law states and/or used to fill in the blanks that labor laws leave for the employer to fill.

Also, to become enforceable, employees must be formally and effectively notified about the contents of the code of conduct. Since the code of conduct is deemed to be part of the labor agreement, the employee must properly acknowledge it. As a consequence, the labor agreement or contract must include a provision stating that the employee agrees to all rules and policies established by the employer in order to be considered part of the labor agreement and mandatory for the employee.

The above-mentioned guidelines are not legally established, they are only recommendations based on different legal principles to make sure that applicability is possible and not challenged.

§ 10.2

B. What whistleblowing protections exist?

There are no express whistleblowing protections. Since terminations with just cause and/or constructive dismissal are well regulated in the law, an employee cannot be penalized or terminated for filing a complaint. Further, under the Costa Rican Constitution, everyone has the right to seek resolution of any conflicts; hence, such right cannot be limited with any kind of penalties. If the employer were to terminate an employee for such reasons, the termination could be challenged and the employer could be ordered to rein-

state the employee.

§ 10.3

C. How are codes of conduct (including whistleblowing protections) enforced?

As mentioned in § 10.1 above, in order to enforce a code of conduct the employer must make sure that the employee accepts all rules, regulations, and policies set forth by the employer to become an integral and mandatory part of the labor agreement. Also, before enforcing a code of conduct or any amendments to it, the employer must notify the employee about the code of conduct's contents.

§ 11

XI. EMPLOYMENT INFORMATION AND PRIVACY

§ 11.1

A. What rules protect the privacy of data about employees?

Privacy restrictions regarding contracts and labor relationships are related to “*Habeas Data*” or the right to Informative Self-Determination. *Habeas Data* is a constitutional protection: it protects the private and personal information of individuals against unauthorized and/or improper use by third parties; and it protects the right of all individuals to restrict how their information is used. *Habeas Data* has been defined by the Constitutional Court as follows:

The widening of the protective spectrum of the Right to Privacy comes as an answer to the current global environment of information and fluidity. Environment that has put in doubt the traditional formulae of protection of personal information, to evolve bearing in mind the need to use new tools that allow the guarantee of the fundamental right of the citizens to decide who, when, where and under what and which circumstances, may have contact with his/her information. It is, therefore, recognized as a fundamental right of every individual or corporate entity to know the information available for him/her, its assets or rights, in any record or file, of any nature, even mechanical, electronic or computerized, be it public or private; as well as the purpose for which this information is intended and for it to be used only for such purpose, which will depend on the nature of the record in question. It gives right also to have that information rectified, updated, complemented or suppressed, when the same is incorrect or inaccurate, or is being used for a different purpose from the one that it should legitimately accomplish. It is the so-called protection to the informative self-determination of the persons, which exceeds its simple environment of privacy. It gives the citizen the right to be informed about the processing of the information and about the purposes for which it will be used, together with the right to access,

correct or eliminate in case an illegitimate damage is caused. . . .⁹

Based on the above, the compilation of information for hiring, control, or monitoring must be ruled by the following principles:

- **Purpose:** The information must be gathered for certain, explicit and legitimate purposes, and not be used later in an incompatible way.
- **Transparency:** The employer must indicate on a clear and open form its activities related to gathering personal information.
- **Proportionality:** The information must be adequate, pertinent, and not excessive in relation to the ends for which it is obtained.
- **Accuracy and conservation of the information:** The legitimately stored information must be precise and updated and it cannot be kept longer than necessary.
- **Security:** Application of the adequate technical and organizational measures to protect all the personal information from any external interference.
- **Legitimacy:** To be necessary for the satisfaction of the legitimate interest of the employer and not to harm the fundamental, privacy-related rights of the worker.

§ 11.2

B. What restrictions are there on electronic surveillance of employees and on the employer's ability to monitor use of computers, personal digital assistants (PDAs), telephones, or other technology?

It is permissible to implement the recording of voice and/or image by means of cameras, as long as it is an objective need of the company. The right to privacy is not violated (in case of cameras located in bathrooms, dressing-rooms, etc.) as long as the existence of these measures is communicated to the employees beforehand, as long as their dignity is not affected, and as long as the cameras and images are used only for the intended purposes. The use of images that may be obtained from cameras in dressing rooms or bathrooms must be limited to what the employee authorized and such limits must not be exceeded, otherwise, the employer could be subject to legal liabilities. Refusal by the employee to grant such authorization cannot serve as a cause to penalize the employee and must be fully respected by the employer.

In general terms, employers are allowed to monitor the use of computers, telephones, and any other technology as long as such control does not violate any privacy related rights and as long as the employees are duly informed in advance about their activities being controlled and on the applicable policies for the use of technology.

With regards to this subject matter, the Second Chamber of the Supreme Court of Justice has ruled as follows:

The right to privacy has a positive content that is projected in multiple

⁹ Constitutional Court, Ruling No. 06793 (2007) (translated from Spanish).

ways, for example: the right to an image, to the domicile and to correspondence. For the Chamber the right to a private life can be defined as the sphere in which nobody can interfere. The freedom of private life is the recognition of an activity area that it is characteristic of each individual and the right to privacy limits the intervention of other people or of the public powers in the person's private life. . . .¹⁰

In addition to the principles of Informative Self-Determination explained above, it is important to consider that the Costa Rican Constitutional Court has established the following with regard to the review of private e-mails on computers given to employees for work:

There is no proportionality between the end pursued by the plaintiff in the matter of interest, that is, to demonstrate the supposed infidelity to the company for which she works, with the publication or exhibition of the communications mentioned.

Also, it is necessary to point out that the electronic mail and the electronic documents stored in the computer are protected by the fundamental right to the secrecy of communications and that there can never be a control of such with inferior guarantees to the ones established by the principle we have mentioned (Article 24 of the Political Constitution). Also, the fact that the computer is the property of the employer company does not mean that the employee has completely given up the guarantee to the inviolability of private communications. . . .¹¹

With regards to the review of electronic mail, it is necessary to note that the Penal Code of Costa Rica contemplates the following:

- **Article 196—Violation of correspondence:** The person who opens up or is self-acknowledged of the contents of a communication addressed to another person, regardless of the means used, will be penalized with prison from one to three years.
- **Article 196 bis—Violation of electronic communications:** The person who, in order to discover the secrets or to harm the privacy of another, without his consent, seizes, accesses, modifies, alters, suppresses, intercepts, interferes, uses or transmits, messages, data, and images contained in electronic, computer and magnetic means, will be penalized with prison of six months to two years. The penalty will be from one to three years of prison, if the actions described in the previous paragraph, are carried out by people in charge of electronic, computer, and magnetic means.

On the other hand, there is still no case law from the Constitutional Court or the Second Chamber of the Supreme Court regarding the recording of telephone calls. However, in practice this is happening with previous notice to the worker as well as to the client or user that calls the company. This is because the voice is considered as one of the “per-

¹⁰ Second Chamber of the Supreme Court of Justice, Vote 4463 (1996).

¹¹ Constitutional Court, Ruling No. 5607 (2006).

sonality” rights, therefore, it is required that the person authorizes the recording of it. The same treatment is given to the person’s image when it is captured with video cameras.

Notwithstanding the above, if an employee is involved in the commission of a felony or a crime, which is proven by the means of recording of telephone calls, such can only be used as evidence if the corresponding telephonic intervention order is issued by a judge.

In summary, *Habeas Data* is not a law, it is a constitutional protection of the right that all individuals have to determine how their information can be used. How it can apply to monitoring e-mail and telephone calls needs to be analyzed on a case-by-case basis in order to determine if such monitoring was abusive or not. The provisions of the Penal Code are applicable if the monitoring actions by the employer are undertaken without notice by the employee and without an authorization by him or her, especially if the calls and/or e-mails that were monitored were of private nature and not labor-related.

§ 11.3

C. What restrictions apply to the export of data to related companies in the United States?

The information obtained by the means of control and surveillance may be shared with headquarters or other related companies whenever there is an objective need of doing so and as long as such information is not used for purposes different from those that justify the surveillance measures.

Concerning the export of data pertaining to employees, there is no restriction on local companies sending such information to companies in the United States as long as such export is intended for the same purposes for which the data was provided by the employee to the employer. For instance, if the local company wants to share a medical report of an employee with its US headquarters, there is no restriction to do so as long as the document is used only for the same purposes for which the employee provided the document and all confidentiality rules that may apply are respected. Nevertheless, it is recommended to have all employees sign a statement at the beginning of the labor relationship in which they authorize such sharing of information with the US headquarters.

Another important issue relating to exporting information concerns intellectual property. If the employee should produce any intellectual property to which the employee is totally or partially entitled to, then the employer should obtain an authorization to share such intellectual property with other companies. This can be solved by including the proper wording in the labor agreement at the beginning of the labor agreement.

Finally, with respect to sharing information that does not pertain to any individual or entity other than the employer, there is no restriction as the information is owned solely and exclusively by the employer and, consequently, the employer can use it freely.

§ 11.4

D. What information must the employer provide to employees before processing (e.g., collecting, storing, using, disclosing, etc.) their personal data?

In general terms, in case an employer is going to use information of the employee for purposes different from those authorized by the employee and/or for purposes not related with the employment relationship between them, the employer must notify the employee about what information is going to be disclosed or used, to whom it is going to be disclosed and for what purposes, and must obtain the employee's express authorization before using or disclosing the information.

§ 11.5

E. What access do employees have to records kept about them by the employer?

The applicable law grants total access due to the principle of Informative Self-Determination explained in § 10.1 above. In general terms, such information pertains solely and exclusively to the worker and under such circumstances the employee has the right to be informed about it.

§ 11.6

F. What record-retention duties does the employer have with respect to information about employees?

Employers are limited on this respect by the rights of the Informative Self-Determination that workers have (*see* § 11.1 *above*).

§ 12

XII. REPRESENTATION OF WORKERS

§ 12.1

A. Do workers have a freedom of association and representation?

Under the Costa Rican Constitution, all workers have the right to associate with other workers and/or to have their interests represented by a union or an association.

§ 12.2

B. How may workers obtain trade union representation?

Workers may obtain union representation by becoming a member of the union.

§ 12.3

C. Are there workers who, by law, must be represented by one or more trade unions?

There is no provision under Costa Rican law mandating that certain workers must be represented. As mentioned above, all workers have the right to be represented, but it is their choice if they decide to associate or not.

§ 12.4

D. What is the role of unions or works councils on a day-to-day basis?

Currently in Costa Rica, unions or work councils are not common. Therefore, they do not have a very important role. Theoretically, unions are important because they collectively represent each worker's rights and interests. They also provide extra protection to each of their members. However, as mentioned above, unions have become less common. The most significant unions were formed several decades ago and represent the rights and interests of public entities' employees. (Thus, foreign employers would not have access to these public entities unions.) Such unions have recently become more of a political force than entities fighting for workers' rights.

§ 12.5

E. What is the scope of the employer's duty to bargain?

Under Costa Rican law, bargaining is more a faculty rather than an obligation or duty, therefore, employers are not obligated to bargain.

§ 12.6

F. Must the employer pay for time spent on union business or allow leaves for union business?

There is no provision under Costa Rican law that obligates employers to pay the employees for the time spent on union matters. Usually union activities are held outside of business hours. In any case, as mentioned in this section, unions are not so common in Costa Rica, especially in the private sector.

§ 12.7

G. What restrictions exist on picketing, strikes, lockouts, and secondary action?

In principle, picketing, strikes, lockouts, and secondary actions are not forbidden under the Costa Rican Labor Code. Therefore, they are legal. The Costa Rican Constitution even recognizes the rights to strike and lockout as fundamental rights of all workers and employers (Article 61). Nevertheless, there are certain rules that must be followed in order for a strike and/or lockout to be considered legal.

For a strike to be considered legal, it must be a peaceful and temporary abandonment of the workplace by a group of at least three workers and with the sole purpose of improving and/or defending their social and economic common rights. Also, the workers must have previously exhausted the conciliation proceedings under Chapter III of Title VI of the Labor Code. Finally, the group of workers participating in the strike must represent at least 60% of the company's or entity's staff.

Concerning prohibitions applicable to striking rights, all strikes in public services are considered illegal. Thus, they are forbidden and can be penalized with termination without liability to the employer. Article 376 of the Labor Code defines which services are considered "*public*" as follows:

- a. all services rendered by government officers and/or employees, as long as such services are lucrative;
- b. those services rendered by agricultural workers if the agricultural products may deteriorate or rot if they are not rendered immediately;
- c. those related to maritime, aeronautical, and railroad transportation, those rendered by workers related with uploading and downloading freight in docks or piers and such being rendered during a trip of any transportation company as long as such trip has still not ended;
- d. the services rendered by workers whose labor is indispensable to avoid an immediate and serious damage to public health and economy, such as clinics, hospitals, hygiene, and/or electric power; and
- e. those that the government may declare as public services as long as Congress has decided to suspend certain fundamental rights.

Also, all violent and/or coercive actions are forbidden, as well as criminal actions such as slander.

Lockouts are legal as long as they are executed by two or more employers in a peaceful manner and as long as they are intended to defend their common economic and social rights and interests. The employers are also obligated to comply with the conciliation proceedings of Chapter III of Title VI of the Labor Code and must give one month's notice to their workers, all prior to executing the lockout.

All restrictions on strikes are applicable to lockouts. That means that an employer is not entitled to execute a lockout if the services being rendered are public in nature. Also, no violent or coercive actions are allowed. Finally, if it is determined that the lockout was made with a malicious intent to keep the workers from duly performing their duties, the lockout may also be considered illegal.

In case a lockout is declared illegal by a court of law, the employer may be compelled to reinstate all workers in their positions, and to pay them all of the salaries they would have received if the illegal lockout did not occur. The employer may also be fined depending on the gravity of the illegal lockout's consequences.

§ 12.8

H. How are disputes with union-represented workers or with unions resolved?

Disputes with union-represented workers and/or with unions are resolved as any other labor-related dispute. That means that they can be resolved by the means of conciliation or arbitration, or through the judicial process. Nevertheless, if workers are part of a union, and are hired under a collective bargaining agreement establishing special due process, then such due process must be complied with.

§ 13

XIII. WORKPLACE SAFETY

§ 13.1

A. What general health and safety rules apply in the workplace?

Besides the usual safety requirements for working conditions, the Labor Code establishes a system of special insurance to protect the employee from accidents during working hours.

This insurance is given by the National Institute of Insurances (INS). There is a detailed schedule containing the percentages of disability that result from work related accidents.¹²

§ 13.2

B. What kinds of specialized workplace safety rules apply in certain industries?

There are specific rules applicable to health and safety issues relating to industries such as construction of boilers, handling and managing of agrochemicals, agricultural aviation, and manufacturing of fireworks.

§ 13.3

C. What compensation is provided for workplace injuries and illnesses?

Workplace injuries and illnesses must be compensated by the INS, as discussed in § 6.2 above.

¹² Basic (limited) information about percentages of disability is *available* at the Ministry of Labor's website: www.ministrabajo.go.cr.

§ 13.4

D. What reassignments or “light duty” is required for injured or ill workers?

According to Article 254 of the Labor Code, the employer is obligated to reinstate in his or her original position any worker that may have suffered a workplace injury or illness as long as the worker is able to work.

If the injured worker, according to the corresponding medical criteria, is not able to normally perform the work that he or she used to undertake, but is still able to perform different work with the company, the employer shall be obligated to reassign that worker, as long as it is feasible. The employer may be required to reassign other staff to different positions so that the relocation of the injured employee is possible.

If reinstatement of the worker may cause him or her some kind of damage or may affect him or her in a negative way, the employer shall be able, if reinstatement by relocation is not possible, to pay all of the worker’s rights and terminate the labor relationship.

§ 14

XIV. TERMINATION OF EMPLOYMENT

§ 14.1

A. What grounds for dismissal are permitted?

Under Costa Rican labor law, any employee can be terminated at any moment and even without just cause. The main issue involves when a termination is considered to be with or without just cause.

An employer may decide to dismiss an employee without just cause at any time. However, the employer must pay severance and, if the dismissal is to be effective immediately, must give notice as well.

Where termination is due to a just cause, severance and notice do not have to be paid to the worker. According to Article 81 of the Labor Code, the following are cases of termination in which the employer is exempt of liability, and thus released from the obligation of paying notice and severance to the employee:

- a. termination due to the worker conducting himself/herself during his/her labor in an immoral manner, or engaging in verbal abuse, slander, or any other action against the employer;
- b. termination due to the worker committing any of the actions mentioned in the previous paragraph against any of his/her coworkers, during work time, as long as discipline is seriously affected and labor is interrupted by reason of such behavior;
- c. termination due to the worker engaging in verbal abuse, slander, or any other action and affecting the employer or any of the employer’s directors, out of the workplace and not during work time, as long as such behavior was not provoked by the employer or its directors and if it creates a work environment that is inap-

propriate for the execution of the labor;

- d. termination due to the worker committing any felony or misdemeanor against the employer's property or assets, or when the worker intentionally causes material damage to the machinery, tools, raw materials, products, and any other objects directly and undoubtedly relating to the employer's activity or labor;
- e. termination due to the worker disclosing and/or using, without proper authorization, any of the employer's intellectual property, trade secrets, or confidential information;
- f. termination due to the worker jeopardizing, with his/her inexcusable recklessness or lack of proper care, the safety of the workplace or of the people who are in it;
- g. termination due to the worker's absence from work, without the employer's authorization or without a just cause, for two consecutive days or for more than two alternate days within the same month;
- h. termination due to the worker, intentionally and repeatedly, refusing to adopt all necessary preventive measures or refusing to follow the procedures to prevent accidents or diseases; or refusing to follow the instructions that the employer or its representatives have clearly provided to the worker in order to achieve the highest efficiency and performance of work and which results in damage to the employer;
- i. termination when the worker, after having been warned once by the employer, abandons his/her work during work time without a just cause or without having been authorized by the employer;
- j. termination due to the worker engaging in political propaganda or propaganda against the democratic institutions of Costa Rica during his/her labor, or undertaking any action that may affect the freedom of religion established in the Constitution;
- k. termination due to the employee working under the effects of alcohol or any other drug;
- l. termination due to the worker using the tools, instruments, and/or equipment provided by the employer for purposes different from their intended use;
- m. termination due to the worker carrying weapons of any kind during work time (except for such special cases duly authorized by the Laws, or when such cutting instruments are part of the hardware or tools used in the work);
- n. termination due to the worker providing, at the time of execution of the labor agreement, false or incorrect information to the employer that induces the employer believe that the worker had capacities, conditions, or knowledge that the worker evidently did not have, or if the worker provided references or personal data to the employer that were later proven to be false, or if at the time of execution of the labor agreement it is clearly proven that the worker is not capable of properly performing the work for which he was hired;
- o. termination due to the worker serving time in prison; and
- p. termination due to the worker engaging in serious breach of the obligations that the labor contract imposes him or her.

Additionally, the employer can dismiss a worker without liability if it is proven that such employee committed sexual harassment.

§ 14.2

B. Under what circumstances may the employee claim that the employer breached its contract with the employee or that the employer has “constructively dismissed” the employee?

A *constructive dismissal* can be defined as a resignation of the worker that was motivated by an intentional breach by the employer of its duties and obligations. For example, constructive dismissal occurs when the employer harasses the employee, or unilaterally changes the terms and conditions of the labor agreement. It is considered illegal as the breach by the employer is clearly intended to terminate the labor relationship by avoiding the employer’s obligations towards the employee. The causes of constructive dismissal, including but not limited to nonpayment of the worker’s salary by the employer or when the employer puts the employee in a situation where the employee’s health or safety is at risk, are included in article 83 of the Labor Code.

§ 14.3

C. What notice requirements are there for dismissal and may the employer provide pay in lieu of notice?

Article 28 of the Labor Code states that any of the parties in a labor relationship can terminate it, without just cause, by providing prior notice (“*preaviso*”) to the other party or by paying for such time if the employer decides not to provide it.

The above-mentioned Article 28 of the Labor Code states that if a worker has rendered his or her services for at least three months but for less than six months, notice shall be one week, hence, if such time is not actually granted, a week’s salary for notice must be paid upon termination.

In cases in which the worker has been rendering services for more than six months but for less than one year, the notice period shall be 15 days. In cases in which employment has been for more than one year, notice shall be equal to one month.

If notice is to be granted as time, the employer is obligated to notify the employee about the decision of terminating him or her and such termination shall not be effective until the notice period has passed. During the notice period the employer is also obligated to grant one day off to the employee per week in order for such worker to find a new job or to attend job interviews.

If the option of notice payment is chosen instead of granting the corresponding time, the amount to be paid shall be calculated by averaging the salaries received by the employee during the last six months of the labor relationship and proportionally applying such average salary to the corresponding notice period.

In all cases, the employee being terminated has the right to receive a written document indicating the termination and the reasons for such.

An employee must also give notice. If he or she does not, the employer has the right to collect the corresponding amount; nevertheless, the above right is rarely enforced by companies.

§ 14.4

D. How is termination pay calculated (including any commissions), and when must it be paid?

For termination purposes, salary is composed not only of the fixed lump sum payment, but also of other amounts received by the employee, in cash or in kind, which imply consideration for services, bonuses, value of extra work, sales commissions, participation in profits, etc.

To calculate the payments to be made upon termination, all amounts other than the regular salary must be considered and/or reviewed. For example, salary-in-kind (i.e., fuel, car, cellular telephone allowances; stock options; incentives on targets achieved; etc.) must all be considered to determine if they were part of the salary or not. This is because under local regulations and case law, they may or may not be considered as salary-in-kind—hence, affecting the base of all calculations. For example, allowances on car, telephone, or fuel expenses *will* be considered as part of the salary if they consist of a fixed amount per period of time but *will not* be considered as part of the salary if they are reimbursed each time against the presentation by the employee of a report for the actual amount spent on such period. Also, if the employee is provided with a company car for any kind of use (labor or personal), then such car will be considered as salary-in-kind. The opposite would happen if the car is provided to the employee only for labor-related purposes.

In all cases, the calculation of the payments that are required to be made to the employee upon termination and/or resignation, must include the proportional vacations and Christmas bonus. No deductions from these items can be made even if the employee authorizes them.

The Christmas bonus is calculated by adding all the amounts earned by the employee since December of the previous year until the date of termination and dividing the resulting amount by 12.

To calculate the vacations payment, the employer must take into consideration whether the employee has enjoyed all accrued vacations days and if not the ones that are pending upon termination must be paid. In addition, one day of salary must be paid to the worker for each complete month of labor worked by the employee since the last anniversary of his or her employment.

Concerning severance and notice, such must be paid only if the termination shall be without a just cause or with employer's liability. Severance is calculated according to the rules established in Article 29 of the Labor Code. Severance pay ranges between seven days of salary and 22 days of salary per year (or fraction of year of more than six

months) of labor, with a limit of eight years. For instance, if an employee is terminated without just cause on the eighth month of the employee's third year of labor, his or her payment of severance would be equal to 20.5 days of salary for each year of labor and for each fraction of a year exceeding six months; that is, 62.5 days of salary. Another example, if an employee is terminated in the employee's tenth year of labor, he or she would be entitled to a severance payment equal to 21.5 days of salary for each year of labor, but with a limit of eight years. The calculation then would be made by multiplying 21.5 days by eight, for a total of 172 days of salary.

With regards to notice payment, if the notice period is not granted, then the employer must pay one week's salary if the employee has completed more than three months of labor but less than six months. If the employee has completed six months of labor but less than a year, the notice payment would be equal to two weeks' salary. Finally, in those cases in which the employee has completed more than one year of labor, notice payment in all cases would be equal to one month's salary.

To clarify, if the employer decides to terminate an employee who has not completed three months of labor (thus, being in his or her trial period), no payments for notice or severance are required, regardless of the cause of termination.

As for the moment in which the employer must pay the above-mentioned items, Costa Rican law does not mandate anything. The ideal scenario would be to pay the employee upon termination. However, if that is not possible, usually the employer advises the employee about the date of payment in the termination letter. Customarily, these payments are made within one month following the date of termination. The statute of limitations for the employee to file a complaint is one year from the date of termination. The more time the employer takes to pay the employee and the closer it gets to the expiration of the one-year limitations period, the higher the possibility of the employee filing a lawsuit against the employer.

§ 14.5

E. Are there rights to severance pay and how is severance calculated?

If the worker is terminated without justification after at least three months of service, the employer must pay a severance payment, which is calculated based on the time served. This could be up to 22 days per year worked, with a maximum calculated on the basis of eight years, all according to a specific calculation table indicated by the Labor Code.

§ 14.6

F. What reasons for dismissal/termination of contract are prohibited, and what remedies does the former employee have?

In general terms, all cases of discriminatory and retaliatory¹³ dismissals are prohibited,

¹³ Retaliatory dismissals do not include termination with just cause or termination without employer's liability.

such as the termination of employees denouncing sexual harassment, and of pregnant or breastfeeding women. In said cases, the employer is required to get an express authorization from the Ministry of Labor to be able to proceed with the termination.

Also, Article 367 of the Labor Code forbids termination of certain employees occupying positions in a union to guarantee the proper practice of syndicalism.

Finally there is also a prohibition on the dismissal of teenage workers. Article 91 of the Childhood and Adolescence Code states that before terminating a teenager, the employer must require a special authorization from the Ministry of Labor, which is only granted if the employer is able to prove the causes of such dismissal.

In cases of wrongful dismissals, the law provides the possibility of reinstating the employee in his or her former position and under the same working terms and conditions.

For the case of unions' directors, Article 368 states that the labor judge may nullify the dismissal and order immediate reinstatement of the worker and the payment of all unpaid salaries. If the employee states that he or she desires not to be reinstated, the employer shall be obligated to pay the worker the corresponding indemnification for terminations with employer's liability, all based on the salary that the employee was not paid for during the term of his or her dismissal.

In the case of pregnant or breastfeeding women that have been wrongfully dismissed, according to Article 94 of the Labor Code, they are entitled to immediate reinstatement with full enjoyment of all their rights, including payment of all unpaid salary. If the employee decides not to file for reinstatement, then the employer shall be obligated to pay her severance, a special indemnification for pre- and post-birth subsidies and salary up to eight months after birth.

In cases of discriminatory dismissals (e.g., by reason of age, ethnic origin, religion or gender), the employer shall be obligated to reinstate the employee and indemnify him or her with an amount equal to 12 times the minimum monthly salary (as established in the official list of minimum wages for each specific category).

For dismissals in which workers do not have special protection, Article 82 of the Labor Code becomes applicable. This provision states that if after termination it is proven that the dismissal was wrongful, the worker shall be entitled to require payment of notice and severance, as well as all unpaid salaries that the employee did not receive during the term he or she remained unemployed until the corresponding court ruling becomes enforceable. In practice, such indemnification customarily amounts to six months of salary due to the long duration of legal processes.

For those employees who are able to prove wrongful dismissal, case law has recognized that such an employee is entitled to compensation for the losses and damages incurred as a result of the wrongful dismissal.

§ 14.7

G. How may former employees bring claims on behalf of other workers (i.e., a collective or class action)?

Generally, a former worker of a company can only bring claims on behalf of other workers if the employees grant a power of attorney enabling the former worker to represent them. However, if the former worker is a representative of a union of which the employees on whose behalf the complaint is being filed are part, the former worker may be able to represent the plaintiff.

§ 14.8

H. May employers compel employees to arbitrate claims of wrongful dismissal?

Employers are not allowed to compel employees to arbitrate claims. This decision must be an act of free will of the employee.

§ 14.9

I. What restrictions exist on obtaining a release of claims from a former employee?

Unless the parties agree on such release by the means of a settlement held before a duly authorized arbitration and/or conciliation center such as the Conflict Resolution Center of the Ministry of Labor, the rights are still enforceable until the statute of limitations runs out. In Costa Rica, most labor rights cannot be waived and unless the release is negotiated through a definitive settlement such as just mentioned, the release may not be effective.¹⁴

§ 14.10

J. What procedure and terms are required to have an enforceable separation agreement with a former employee?

For a separation agreement to be mandatory for both parties, it must have been entered before a duly authorized conflict resolution center, such as one of the Conflict Resolution Centers within the Ministry of Labor.¹⁵

¹⁴ The Law for Alternate Conflicts Resolution provides that settlements executed before a duly authorized Conflicts Resolution Center are definitive and have the same force as a court ruling.

¹⁵ See § 14.9 above.

§ 14.11

K. What are the best practices employers should observe regarding dismissals of employees?

The best practice is to start by determining if the termination is with or without just cause. The employer must not force a termination into the “just cause” category as the alleged causes could be challenged and bring more trouble to the employer later on. It is much safer to terminate an employee with just cause when it is 100% clear that the causes of termination can be fitted into one of the causes established in article 81 of the Labor Code.

It is recommended that the employer assume all obligations under the law. If the law mandates to make certain payments to the employee upon termination, then the employer should make such payments in full and as soon as possible, in order to avoid the potential of additional costs in the form of attorneys’ fees, expenses, interest, etc.

§ 15

**XV. COLLECTIVE DISMISSALS (LAYOFFS),
BUSINESS CESSATION & SALE OF A BUSINESS**

§ 15.1

A. What rules apply to collective dismissals?

Collective dismissals are not regulated as such by the Costa Rican labor law.

§ 15.2

B. Are there special rules that apply when an employer ceases operations?

Costa Rican labor law does not include any provisions on how a company must close its operations. If a company closes, the employer is obligated to dismiss all workers with employer’s liability, meaning that the corresponding notice and severance, as well as all other additional rights, must be paid to the workers in order to fully compensate them.¹⁶

Concerning layoffs, Costa Rican law does allow the possibility of suspending the labor relationship without terminating the employees or eliminating any rights or obligations deriving from such relationship.

Article 74 of the Labor Code states that the labor relationship may be suspended without liability for any of the parties when:

- there is a lack of raw materials to continue the corresponding work, as long as such lack is not imputable to the employer;
- any *force majeure* or act of God forces the parties to necessarily and immediately

¹⁶ Labor Code, arts. 28, 29 and 153 and Law 2412.

suspend the labor relationship; or

- the employer dies or loses legal capacity. This requires the necessary and immediate suspension of the labor relationship.

§ 15.3

C. Are certain employees protected from collective dismissal?

As mentioned above, collective dismissals are not regulated as such by the Costa Rican labor law.

§ 15.4

D. How long does the collective dismissal process usually take?

Since collective dismissals are not regulated as such by the Costa Rican labor law, the termination of each worker must be addressed individually, and employers must pay notice and severance. How long the dismissal of all employees should take usually depends on how many employees the company has and how fast the employer wants to complete the process. Notwithstanding the above, it is highly recommended to complete the process in the shortest period of time to avoid any lawsuits. The statute of limitations for filing of a labor related lawsuit is one year. Thus, if the company starts closing operations, all employees should be fully paid for all their rights within one year from the moment of their termination.

§ 15.5

E. What rules govern the transfer of undertakings (including employment and labor agreements) when a business is sold?

The main rules applicable to acquisitions or mergers involve the substitution of the employer. Under Article 37 of the Labor Code, the substitution of an employer must not affect the workers' rights. Substitutions may not diminish such rights. Also, the new employer shall be jointly liable with the former employer, for up to six months, for any contingency that may arise from such substitution or that may have already existed before the substitution. After six months have passed, the new employer shall be solely liable for all such contingencies.

To reduce any risks of assuming unknown liabilities or obligations, it is recommended for the buyer to require the seller to terminate all of the employees by payment of all of their rights so that a new labor relationship between the employees and the new employer is initiated. Such termination does not guarantee, in full, that the new employer may not eventually be liable for any omissions incurred by the former employer; however, it considerably minimizes the risks of assuming any contingencies.

XVI. KEY TRAPS TO AVOID

§ 16.1

A. What are the most common mistakes foreign employers make and what can be done to avoid them?

Based on experience, the most common mistakes incurred by foreign employers are the following:

- 1. To agree with their employees not to report the employees to the CCSS (Costa Rican Social Security Agency) or to not report their full monthly salaries.**

The solution is to report all payrolls in full, meaning that all individuals who may be considered employees must report all of their monthly incomes, including ordinary salaries, commissions, bonus, salary-in-kind, etc.

- 2. To use professional services agreements or to hire individuals as contractors when there is actually a labor relationship.**

As mentioned earlier, regardless of what the contract says, if the relationship is of a labor nature, all obligations deriving from labor law are applicable. The solution is to hire each individual under the correct contract and to make sure that what is agreed in writing corresponds to what is being practiced.

- 3. To require employees to work for more hours than those established by law, and thinking that this is solved by paying overtime.**

Under Costa Rican law, overtime must be an exception and in no case may it be turned into a custom. The solution is to adjust all shifts to the legally established limits and to avoid using overtime unless it is necessary and as an exception.

- 4. To compensate overtime or mandatory holidays with extra days off is a common mistake.**

The law mandates that overtime must be paid with an extra 50% of the ordinary hourly salary and that required holidays must be paid double overtime if the worker is to render services during those days. Any other remedy is illegal and ineffective. The solution is to compensate overtime and/or worked holidays as mandated by the law.

- 5. To unilaterally modify the terms and conditions of the labor agreement in a way that penalizes the worker.**

It is important to bear in mind that most of the terms and conditions are vested rights and that they may not be modified unless the employee expressly agrees to such modifications.

- 6. To bring foreign employees to work in Costa Rica and not comply with all immigration regulations.**

Even if an employee comes for a short time, the immigration status must be legalized as to avoid any liabilities for the employer.

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