

Labour & Employment 2012 – Dominican Republic

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1 May foreign employers hire employees directly in your jurisdiction or is it necessary to act through a local subsidiary?

Foreign employers may hire employees directly in Dominican Republic. The Foreign Investment Law of 1995 grants foreign investors the same rights and obligations as local investors.

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

Yes. Although the limit is 20 per cent, there are exceptions for specialised, administrative or technical workers or family members.

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

Only when such laws grant more favourable conditions to the workers than those provided by Dominican laws.

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

In broad terms, our labour regulation does not require express formalities in the work contracts in order for them to be enforceable. In fact, in our legal system, the work contract can be oral as well as written. The oral contract does not need any formality to be enforceable.

But as to the merits of such agreements, in order for them to be enforceable they cannot limit the rights or prerogatives of the workers as set forth in the Labour Code and ancillary legislation which are of public order.

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

As indicated, it is not necessary to formalise work contracts in writing. It is important to note that under Dominican law the agreement between the parties will be that which is applied in practice over and above what may be in a written agreement.

Notwithstanding, it is customary for employment agreements with administrative or managerial personnel to be in writing. The advantage is its probative value, in the event of a dispute between the parties as to the agreement's specific rights and obligations.

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

In addition to the payment of salary, the employer must make contributions to the Dominican Social Security System for family health insurance, old age insurance, incapacity and survival, and insurance against labour risks. In like manner, the employer must contribute to the regular payments to the pension funds to which the employee belongs.

The contributions made by the employers for the social security can be reported as expenses and deducted previous to the payment of taxes by the employers.

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

There are a number of benefits in addition to the salary that Dominican employees are entitled to. Among those are severance benefits based on the employee's seniority, profit sharing bonuses, a double Christmas salary and paid maternity and vacation leave.

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

There is no difference in the role of unions if the employers are foreign or domestic.

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

Yes. The right to form unions is protected in the Labour Code and the Dominican Constitution. Employees and employers must honour this right.

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

Duly registered unions may be a party in a labour controversy. They can act as plaintiff or defendants in labour lawsuits or collective bargaining agreements. Unions can set conditions in their by-laws in addition to those contained in the law, for the admission of its members and, in this regard, to autonomously set the conditions for their exclusion, with these decisions not being able to be appealed via any action.

On the other hand, the members of a union in formation, up to 20 in number, and part of the members of the board of directors of a union, enjoy the 'union enclave' (*fuero sindical*), according to the proportion indicated in article 30 of the Labour Code.

The company cannot dismiss a worker protected by the union enclave. For this, it must submit the case to a labour court for it to determine if the cause for the dismissal is due or related to their union activity, or if otherwise it is about

an infraction related to non-compliance with their obligations derived from the work contract. If the company dismisses the worker without complying with this formality, the dismissal can be deemed to be null and void.

In the same manner, the company can also not put an end to the work contract of a worker protected by the union enclave via dismissal without cause (*desahucio*). Dismissal without cause is when the employer puts an end to the work contract of the employee without having or alleging any cause. Dismissal without cause carried out in these conditions produces no judicial effect.

In like manner, unions cannot block freedom to work, nor take any measure to constrain workers or employers from being members of the association or to remain therein. Any member of a union can be severed from it at any time, despite a contrary clause in the by-laws, without any obligation except the payment of pending dues.

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

A strike is the voluntary suspension of work carried out collectively by workers in defense of their common interests. While unions can coordinate the strike, this is not a specific attribution of them, but rather is inherent to all the workers of the company, whether they are members of the union or not. A strike must be limited to the act of suspension of work.

Strikes have been conceived in Dominican legislation as an extreme measure which can only be resorted to after having exhausted all possible attempts of amicable negotiation. Therefore, before declaring the strike, the workers must notify the Ministry of Labour in writing, explaining the motives and must have the approval of at least 51 per cent of the totality of the employees, and it must request from the Ministry its mediation towards a settlement of the conflict, and if this is fruitless, then three arbiters must be named. Doctrine affirms that this requisite is demanded when the conflict has an economic foundation, but if on the contrary the cause of the strike is a foundation of law or a right, such difference can be submitted directly to the labour judge.

During the strike, the workers cannot incur in violent actions against nor promote disorder if such actions should take place, the company can request that the strike be declared illegal, with liability for the authors causing the damage.

During the time of the strike, the company can request the Labour Department to order the return of the workers who may be necessary, in order to maintain the indispensable work of security and conservation of the machinery, work centers and raw materials.

On the other hand, the company has the channel of requesting a labour court to hand down a writ ordering the return of the workers to their activities and that it proceed with putting together arbiters for the solution of the difference. If this request is sustained by the judge, the workers must go back to their work within a term of 72 hours, with liability against those who do not abide by the judge's decision.

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

The Dominican Constitution and labour laws govern the enforcement of international labour treaties and agreements. Although in principle, the labour law is of territorial application, when there is conflict of laws in accordance with a specific labour law, the one that applies is the one most favourable to the employee.

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

The Dominican Republic is a member of the International Labour Organization, and has assumed the agreements and recommendations proposed, which in its majority are included in our legislation.

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

The process for arbitration for the solution of labour conflicts is contained expressly in Dominican labour regulation. The Dominican Labour Code, in its article 419 provides that in all cases of labour conflict, of whatever nature, the employees and workers, or the associations representing them, can agree to the submission to the judgment of freely chosen arbiters.

The decision rendered by the court is only valid, as long as it is not estranged to the dispositions of public order of the labour law.

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

Dominican labour regulation enshrines the principle of territoriality of Dominican labour laws and this is a public order principle, ie, the parties cannot by way of contract override the territorial competence of one court and grant it to another. In order to determine the territorial competence of a court to consider a given lawsuit, the following are taken into account:

- the place of the execution of the contract;
- if the work is executed in several places, by any of them at the option of the plaintiff;
- by the place of domicile of the defendant;
- by the place of the execution of the contract, if the domicile of the defendant is unknown or doubtful; and
- if there are several defendants, by the place of domicile of any of them, at the option of the plaintiff.

If the procedure or lawsuit is carried out before a labour court of common law, the language to be utilised is Spanish, due to its being the official language of the Dominican Republic.

16 Do labour or employment proceedings generate or accrue taxes, duties or any kind of fees, including attorneys' fees?

No, labour proceedings are exempted from the payment of taxes of any nature. However, lawyers' fees, if collected and calculated pursuant to the standards established in Dominican common law. That is, in principle, they should be in line with the representation agreement signed by client and lawyer, or as per the rate set by the Law of Attorneys' Fees, No. 302.

17 Is there a concept in your jurisdiction providing for class-lawsuit in labour or employment matters? Does your law allow the consolidation of multiple labour or employment proceedings?

Dominican labour regulation enshrines the power the unions possess of filing actions and lawsuits in representation of its members to execute or interpret clauses of the collective pact on work conditions. The term 'class action' does not exist in the legal regulation, to our understanding.

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

First, it is not mandatory for the parties to appear before a court represented by lawyers. They can act in their own defence. However, if they should decide to be represented by lawyers they have to provide the power given to the latter.

Foreign lawyers, in order to exercise the profession in our country and to represent the parties in judicial processes, must first exhaust a procedure of validation of their title, authorisation and subsequent registration in the Dominican Bar Association (Colegio Dominicano de Abogados). That is, they may not automatically and directly participate in labour proceedings.

19 What are the rules on discovery in proceedings?

In the Dominican labour procedural system, the framework of freedom of proof prevails. This means that the parties are at liberty to provide the measures of proof sustaining their respective positions within the litigation. However, the Dominican Labour Code in its article 541 sets forth a series of modalities of proof that can be utilised by the parties in the process and, as such, can be provided or requested by the empowered judge, namely: authentic or public acts; acts or records from the labour administrative authorities; the books, account books, records and other papers which the labour regulations or laws require of employers and workers; testimony; human assumptions; indirect inspection of places and things; expert reports; confession; and oaths.

It should be indicated that in the labour area there is no hierarchy of proof, that is, one element of proof does not have more probatory effect than another. In this regard, the judge has full freedom of evaluation of said proof and is free to choose which among those submitted seem to him to be the most advisable.

That said, it has been decided by judicial precedent that the act of the judge rejecting the request of one modality of proof suggested by the parties, this does not mean that their right of defence has been violated, on the basis that the court was sufficiently edified with the proofs that were submitted.

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

In order for a foreign court sentence to be enforceable in the Dominican Republic, it must first be declared to be enforceable by a Dominican court, for which purposes it examines the following:

- if it is accordance with the Dominican constitution;
- its regularity and irrevocable nature;
- that it is not contrary to public order; and
- that it has been certified by the Dominican Consulate of the country from which the sentence originates.

In this regard, if the sentence coming from a foreign Court is definitive, irrevocable and complies with the requisites of due process, it can be enforced in the Dominican Republic, upon an exequatur handed down by a Dominican court.

Besides if the foreign court sentence come from a country party to the Codigo de Bustamante signed on 27 November 1928, said sentence would be enforced provided complies similar requirements to those for the exequatur.

Finally it should be remarked that the Dominican Republic is a party to the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards.

21 May labour courts or boards grant interim relief? If so, how is that relief enforced? Does it apply to assets located abroad?

Dominican courts can order conservatory measures in the course of a labour process. For that purpose, a writ must be requested from the competent judge, which after having analysed the urgency, or if collection of the credit appears to be in danger, he or she can order placing conservatory measures on the assets of the debtor. It does not appear to us that this writ is enforceable abroad, given that it is not about a sentence with the force of enforcement, but a mere administrative writ.

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

Yes, the court can, as a matter of law order any institution to render the documents that support the examination of the process, likewise it can, in accordance with the procedure rules of common, law as a matter of law of a party, summon any person whose hearing seems useful for the clarification of the process; in the case of a negative, it can sanction with a fine

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

Yes, the labour court can acknowledge to a party indemnifications for damages as a remedy in the case that the other party had caused such damages as a consequence of breaching the labour law.

This without impairment of the indemnifications stated and preset in the labour law that come from the unilateral termination and without cause of the labour contract, notice and severance.

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

Sentences handed down by labour courts are enforceable the third day after being notified. This translates into the winning party being able to place conservatory as well as executive measures over the assets of the losing party in order to collect the credit that may have been acknowledged to it.

Although the sentence can be appealed, this does not suspend its execution. In order to suspend execution, the interested party, upon court authorisation, must consign an amount equivalent to twice the sentence amount, with a commercial bank and subsequently request the court judge to order suspension of execution of the sentence, until the appeal action has been filed should be decided.

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

The party that is not content with the decision of the court must claim that the has a distortion of the facts or that the law has been wrongfully applied, in order to appeal a sentence of the first circuit courts. The party that is not content has a period of one month to appeal the sentence, counted from the day of the notification of same.

In the case of awards, they can be challenged by nullity under the assumption established in the common law, or in cases where it violates the labour rulings. The arbitration process is not commonly used to settle conflicts between parties, but rather between conflicts related to the collective agreements between employees and employers.

26 If a party files a lawsuit in violation of an agreement to arbitrate, will a petition by the defendant to remit the lawsuit to arbitration be granted by the labour courts or boards in normal circumstances or is the right to sue unwaivable? If so, will that petition be treated as a threshold matter or will it be rolled into the merits of the litigation such that the defendant will also need to defend the merits of the lawsuit in court?

The defendant, as an incompetency of its attributions, must present this solution to the court, and even the court can recognise the arbitration clause as a matter of law, and order the decline of the file.

It is up to the court's discretion to decide on the matter of incompetency raised, or instruct the process and render his decision along with the merits of the case.

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

In the labour sentence itself handed down by the court, in the event it sentences amounts of money, the winning party is ordered to pay an indexation, according to the variation that the national currency has suffered, from the date on which the suit was filed and date the sentence was pronounced.

28 Is a labour court or board empowered to award attorneys' fees to the prevailing party?

Yes.

29 Please describe the standard used by the courts in deciding whether to vacate an award.

In principle, the action can be initiated while the award has not been executed. The court will consider the nullity causes, such as: violation of the labour law,

when a previous commitment between the parties has not existed; when the commitment is null; and when the arbiters were not authorised.

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

No, if the award is declared invalid it cannot be enforced by the party

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

Although Dominican wage scales are quite competitive on a worldwide scale, employees benefit from a rich severance protection that amounts to about six weeks' salary per year of employment.

Dominican courts tend to be very pro-employee. It is generally advisable to settle out-of-court settlements than to litigate. Litigation increases the costs to the employers and exposes them to enforcement actions in the event of an adverse judgment. There is a labour principle called *indubio pro operario*, whereby any doubts in the application of a given right or obligation should be decided in favour of the employee.

That said, Dominican labour laws grants employers the right to freely hire or terminate employees without the participation of any government entity.

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