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The New Mexican Federal Labor Law: An Analysis

J. Sandoval

THE NEW MEXICAN FEDERAL LABOR LAW: AN ANALYSIS*

JOSÉ SANDOVAL**

PART I

INTRODUCTION

A new Mexican Federal Labor Law (D.O. April 1, 1970; D.O. April 30, 1970) became effective on May 1, 1970, thus repealing the previous law of the same name which had been in force since 1931. In general, the new law respects the fundamental principles of its predecessor and maintains essentially the same structure. Federal labor legislation thus continues to be governed by Article 123 of the Mexican Constitution which remains unchanged.

The following is a brief commentary on the principal amendments incorporated in the new statute:

1. Benefits granted to employees were increased. Studies appearing in business publications have generally agreed that the cost of labor will be increased by the new law by an average of 27%, said increase varying between 15 and 35% in accordance with the nature and size of the business enterprise. It should be noted, however, that the employee benefits required by the 1931 statute (annual bonus, holidays, etc.) in many cases were less than the benefits currently being granted by larger companies. These company benefits, in many instances, will also equal or exceed the increased benefits required by the new Federal Labor Law. Thus, it appears that the smaller companies will feel the greatest impact of the new law since, given their limited resources, they have often limited themselves to granting the minimum benefits required by the law of 1931.

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**José Sandoval is an attorney on the staff of Hidalgo, Barrera, Siqueiros y Torres Landa of Mexico City; José L. Siqueiros is the Mexican correspondent for the *Lawyer of the Americas.*

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2. The clear purpose of the new law is to establish a more modern labor legislation, reflecting in its provisions the technical and economic progress achieved by Mexico. This is most evident in the new provisions relating to occupational illnesses and risks which were unknown in 1931; also, with regard to the provisions relating to certain special occupations, as for example, those found in the airline and maritime industries.

3. The terminology used in the 1931 statute has been modernized in order to avoid ambiguities and to set forth clearly the rights and obligations of employers and employees. The Congress took into account the many criticisms of the former legislation and incorporated in the new law many terms and concepts which have been the subject of discussion in Mexican juridical writings, legal doctrine, judicial precedents and legal practice since 1931. Consequently, the new law is superior to the law of 1931 by virtue of its clarity, uniform terminology and comprehensiveness.

The new law contains 890 articles *vis a vis* the 685 articles in the former law. However, it should be taken into account that the 1931 law contains several lengthy articles, such as Article 100, paragraphs A through U (minimum salaries and employee profit participation) and Article 110, paragraphs A through D (protection afforded to female employees, etc.), which are divided into separate articles in the new law.

NEW EMPLOYEE BENEFITS

The following, a summary of the increased employee benefits established by the new law, will have a direct impact on labor costs. A more detailed analysis of many of the points discussed herein will be made in subsequent sections of this study.

1. An obligation is established to supply housing for employees. This obligation will only be imposed upon companies which are located outside towns or cities (the company should be located more than three kilometers from the town or city, or at a lesser distance if no regular transportation service exists) and upon companies located within towns or cities when employing more than 100 employees.

2. Employees are granted the right to receive an annual bonus equivalent to at least two weeks salary, payable before December 20 each year.

3. Employees have the right to an additional "premium" equivalent to no less than 25% of their salaries during their vacation period.

4. Two obligatory holidays are added to the previous list; 1 January and 5 February.

5. Employees working overtime in excess of 9 hours a week shall be paid 200% more than the normal hourly wage (triple wage). Normal overtime (9 hours per week limit) shall receive 100% more than the normal wage (double wage), the same as established in the former law.

6. The practice of paying triple wages to employees who work on obligatory holidays is recognized. The new law provides that employees do not have to work on obligatory holidays. However, if the employee works on an obligatory holiday at the insistence of the employer, the latter shall pay the employee, in addition to the normal wage he would receive on the holiday, a double wage for the services rendered (triple wage).

The 1970 law also provides that the employer shall make every attempt to allow the employees to rest on Sundays. If the employee is not permitted this day of rest, he shall have the right to an additional "premium" of 25% of his normal daily wage for the Sunday worked.

7. Certain seniority rights are granted to employees. The most important is the "premium for seniority" which consists of an amount equivalent to 12 days salary for each year of service. This can be requested in the following cases:

a. By employees with at least 15 years service who voluntarily resign their positions.

b. Regardless of the amount of time employed, by those employees who are discharged or separated for any reason whatsoever, *independently of whether or not the employee is discharged with or without justification.*

c. In the event of the death of the employee, *regardless of the amount of time employed, the "premium" shall be paid to his beneficiaries.*

8. The amount of time for the work shift is defined as "the time during which the employee is at the disposition of the employer for the rendering of services". As shown subsequently, this provision can result in a reduction of the time the employee is effectively at work.

9. In cases of continuous work shifts, the employer is obligated to provide the employee with a minimum rest period of one half hour.

10. The number of vacation days is increased as follows: two additional days for each five-year period of service rendered after the fourth year of employment. That is, after the ninth year of employment, the employee will have the right to two additional days of vacation; after the fourteenth year, 2 more days are added, etc. The same number of vacation days is maintained for employees who have worked for less than nine years: 1 year — 6 days; 2 years — 8 days; 3 years — 10 days; and 4 to 9 years — 12 days.

11. Employee profit participation which is not claimed by the employee in a given year shall be added to the employee's profit participation in the following year.

12. The former periods of time within which employers were not required to give employee profit participation have been halved with respect to newly-formed companies (1 year instead of 2); for companies which produce a new product (2 years instead of 4).

13. Employees are granted the right to strike in order to enforce compliance with employee profit participation.

14. All of the labor provisions relative to the apprentice contract were eliminated and this type of contract will no longer be available.

GENERAL PRINCIPLES

Article I of the new law restates its federal nature and the fact that it governs throughout the Republic of Mexico.

The new law states the general principles upon which it is based and defines the juridical concepts relating to its goals, as well as the nature of the employment relationship.

With respect to its objectives, the new statute affirms that labor legislation attempts to achieve equilibrium and social justice between employees and employers.

The legal nature of the employment relationship is set forth in the statute as a composite of "social" rights and obligations; the law also states that employment — not being an article of commerce — demands that the liberties and the dignity of the employee be respected.

The statute categorically provides that no distinctions can be made

with respect to employees by reason of race, sex, age, religion, political belief or social condition. This principle of social equality is only limited by the provisions which establish protection for female and minor employees, as well as by the limitations with respect to the number of foreigners who can render services to a Mexican company.

Article 5 states that the provisions of the new law are norms of public law. Consequently, the principle of freedom to contract in the civil law is not applicable to labor law. Thus, any of the following are null and void:

1. Employment of children under fourteen years of age.
2. A work shift in excess of that permitted by law.
3. An "inhuman" work shift by reason of its notorious excessiveness considering the nature of the work, as determined by the Board of Conciliation and Arbitration.
4. Overtime for women and minors less than sixteen years of age.
5. A salary less than the minimum wage.
6. A salary which is not adequate compensation as determined by the Board of Conciliation and Arbitration
7. A period in excess of one week for the payment of salaries for "laborers".
8. The payment of salaries in a place of recreation, such as taverns, bars, cafes or shops, if the employee does not work in such an establishment.
9. The direct or indirect obligation of the employee to obtain articles of consumption at a specific store or place.
10. The withholding of salaries by the employer to satisfy a fine.
11. The payment of a lesser salary, for reasons of age, sex or nationality, than that paid to another employee of the company for work rendered with the same efficiency, for the same type of work or for the same work shift.
12. Industrial work at night, or work in commercial establishments after 10:00 p.m. for women and minors less than sixteen years of age.
13. The waiver by an employee of any of the rights or prerogatives granted him by law.

The foregoing provisions for the protection of the employee are implicit in the Federal Labor Law of 1931. Article 5 of the new law merely summarizes in one provision those protective measures which are also granted in diverse chapters of the new statute, for example, those dealing with salary, work shift, etc.

RELATED LEGAL PROVISIONS

Article 123 of the Constitution is applicable and has priority in relation to employment. The new Federal Labor Law and its regulations have secondary application.

Treaties which Mexico has entered into with foreign countries shall be applicable to the employment relationship only to the extent that they benefit the employee, but not when they limit the rights granted to employees by Mexican labor legislation.

In the event that the pertinent legal provisions do not cover a factual situation, the particular case will be governed by the legal provisions applicable to similar cases, general principles of law, the general principles of social justice expressed in Article 123 of the Constitution, jurisprudence, and custom and equity, in the order set forth above.

In conclusion, the new law expressly provides that in the case of doubt concerning the interpretation of labor legislation, such doubts shall be resolved in favor of the employee.

THE EMPLOYMENT RELATIONSHIP

The new law adopts concepts presently incorporated in legal doctrine and substantially modifies their terminology. Fundamentally, it recognizes the existence of the employment relationship and reflects that the existence or non-existence of the employment contract is irrelevant. Therefore, the existence of the employment relationship has been given greater importance, such relationship being independent of the acts which initiated it, the employment conditions expressed in writing (employment contract), as well as the form and provisions of the contract. The employment relationship is legally defined as that relationship which arises from the rendering of "personal subordinated work" in exchange for the payment of a salary regardless of the act which gives rise to such relationship.

The concept of "subordination" replaces the concept of "direction" and "dependence" established in the previous statute. This means that

the employee is subject to the orders of the employer with respect to the time and form of his employment. The employment relationship does not require the existence of "economic dependence". All that is required is the existence of compensation, that is to say, the payment of a salary. Notwithstanding the above, the new law defines the "individual employment contract", and refers to the document in which "employment conditions" are set forth in order not to ignore current practices and to show the legal basis of the employment conditions. However, the new law confirms a current realistic trend by establishing the presumption that there is an individual employment contract when a document exists in which a person obligates himself to render "personal subordinated work" to another person in exchange for the payment of salary, *independently of the form or name given to such document.*

PERSONS SUBJECT TO THE LAW

New terminology is also adopted to define those persons subject to labor legislation.

1. *Worker* (employee) is the individual (natural person) who renders to another person, individual or company, "personal subordinated work". This concept is clarified by establishing that work comprises all human activity, intellectual or material, independent of the level of technical preparation required by each profession or occupation. What is important, is the rendering of the "personal subordinated work", even though such work is rendered by a professional or a highly specialized technician.

2. *Worker of trust* (in the 1931 statute *employee of trust*) is an employee who renders service relating to management, inspection, supervision and control, as well as services rendered personally to the employer within the company. These provisions of the new legislation are identical to the former law. However, the new law adds a provision which substantially limits the concept of worker of trust where it provides that the management, inspection, supervision and control must have a *general character or nature.* Therefore, it appears that a worker of trust must at least perform services in relation to an entire section or department of a company.

It is important to note that in addition to the causes for rescission of the employment relationship applicable to normal employees, the former law permitted the rescission of the employment relationship whenever the employer lost his confidence in said "worker of trust". The new

law retains this cause for recission, but conditions it upon the existence of a "reasonable motive for the loss of trust". Consequently, if a reasonable motive for the loss of trust can not be established (nor any other normal cause of rescission), the employee can demand the payment of the constitutional indemnification described subsequently.

3. *Employer* is the person, individual or company, who utilizes the services of one or more workers. Thus, the new law defines more precisely and expands considerably the definition of employer.

The former law deals only with representatives of the employer and with "intermediaries" in the hiring of employees. The new law defines these and other concepts as follows:

a. *Representatives* of the employer are considered to be the directors, administrators, managers and other persons who exercise the functions of management or administration in the company. The activities of these individuals obligate the employer in his relationships with employees.

b. *Intermediary* is a person who hires or intervenes in the hiring of employees who will render services to the employer.

c. In addition, a hybrid figure is created which falls between the concepts of representative and of intermediary. The new law establishes that if an employee *in accordance with an agreement or with custom,* utilizes the services of other employees, the employer of the first employee is also the employer of the other employees.

The new concepts created by the new law follow:

a. Companies are not intermediaries and shall be considered employers when they contract for work on behalf of other companies (for example, contracts for construction or for services) in order to perform the work with "its own sufficient elements for the performance of obligations deriving from the employee relationship." Accordingly, such companies shall be obligated and be responsible only to the employees it hires for such work.

b. Notwithstanding the above, if the company referred to in the previous paragraph which contracts for work (construction or services) on behalf of other companies, lack "sufficient elements" to perform the obligations deriving from the employee relationships, the direct beneficiary of the work or services (the

other company on whose behalf it contracted) shall be jointly responsible with the first company. In other words, joint responsibility is established for the beneficiary of the work or services rendered by a company which does not have "sufficient elements" to satisfy its labor obligations. The protection which the legislator wishes to afford employees in this instance leads to a situation of insecurity for the employer. A company which requests work or services can not know when it may be jointly responsible for labor obligations assumed by the company with which it contracts for such work or services. An example may make the situation clear. If the owner of land contracts with Company X for the construction of a house thereon, and Company X does not have sufficient elements of its own to perform its employee obligations, the beneficiary of the construction, (the owner of the land), will be jointly responsible for the labor obligations of Company X.

c. Joint responsibility is established for companies which perform work or services *in an exclusive or principal manner* for another company, the first company not having sufficient elements of its own to comply with its employee obligations. The company which receives the benefit of the work or services is jointly responsible with the company rendering same.

d. With respect to the joint responsibility of the employer referred to in paragraphs b and c immediately above, it should be clarified that joint responsibility flows from the fact that the company performing the work or rendering the services to another company lacks sufficient elements to comply with its labor obligations. Naturally, if it has sufficient elements to cover its labor obligations, it is the only "employer" and the only entity responsible. On the other hand, the beneficiary of the work or services will be considered an employer and jointly responsible for the labor obligations of the company rendering services or work in the event the second company can not meet its labor obligations.

e. A distinction is made between a company which constitutes a complete unit for production and distribution of goods or services, and an "establishment" or branch which forms a part of such company. The employees of the "establishment" or branch must enjoy the same work conditions as the employees of the basic company.

In this connection it is provided that the minimum salaries which govern in the different economic zones of the Republic of Mexico should be taken into account, as well as *the other circumstances which can influence work conditions.* This limitation is quite vague and will undoubtedly be the subject of future clarification.

SUSPENSION OF THE EMPLOYMENT RELATIONSHIP

The causes for the temporary suspension of an employee (the obligation to render services and to pay salary referred to in the 1931 law as "suspension of employment contract") are modified in the new statute. The 1970 law does not include the following for the suspension of the "individual employment relationship":

The lack of raw materials, provided that the insufficiency is not imputable to the employer; the lack of funds and the impossibility of obtaining them for normal operations, if fully verified by the employer; overproduction in relation to economic conditions and the circumstances of the market; the clear and notorious economic impossiblity of the company to continue operations; suspension of work as a necessary and immediate consequence of *force majeure* or acts of God which are not imputable to the employer; the failure of the Government to supply funds which it should make available to companies with which it has contracted for work or services, provided such funds are indispensable; the death or incapacity of the employer when this results in the necessary, immediate and direct temporary suspension of work.

Nevertheless, the new law now incorporates all of the aforementioned causes, with the exception of the last cause (death or incapacity of the employer) for the *collective* suspension of the work relationship (the temporary suspension of all the employees of an employer).

As in the 1931 statute, the new law includes as causes for individual suspension the contagious disease of the employee or his imprisonment. The new law also adds the following as causes for individual suspension:

The temporary incapacity of the employee by reason of an accident or illness not resulting from a work risk; the arrest of the employee, unless the Boad of Conciliation and Arbitration considers that the termination of the employment relationship is appropriate; the rendering of services and the performance of duties considered obligatory by the Constitution; the designation of the employee as a representative before Government agencies or labor institutions; the lack of necessary documents required by law and applicable regulations when said lack is imputable to the employee.

RESCISSION OF THE EMPLOYMENT RELATIONSHIP

The causes for rescission of the work relationship (previously the causes for the rescission of the individual employment contract) by the employer, without incurring any responsibility whatsoever, are substantially the same as in the former law. The following observations should be made: (a) Rescission for lack of propriety or honor, violent acts, threats, injuries or mistreatment against the employer, his family or representatives is limited by the following phrase — *unless provoked or unless (the employee) acts in self-defense,* and (b) Rescision for the appearance of the employee at his place of work in a condition of intoxication is limited by the following phrase — *unless the employee is under the influence of a narcotic or drug which has been prescribed medically. Before beginning his services, the employee must inform the employer and submit the doctor's prescription* duly signed.

When the employer wishes to rescind the employment relationship he must give the employee written notice of the date and of the cause or causes for the rescission. No sanction whatsoever is established with respect to this obligation although it could be considered as an indispensable condition in order to justify the rescission of the employment relationship. Accordingly, it is advisable to give the written notice which specifies the date upon which the rescission will take effect and the cause or causes for such rescission.

The causes for rescission of the employment relationship by the employee, when such causes are imputable to the employer, are substantially the same in the new law as in its predecessor. There is one change which merits comment concerning rescission for lack of propriety or honor, violent acts, threats, injuries or analogous matters, against the employee or his relatives by the employer or his employees. The new law fails to include the requirement of the former law that the acts committed by the employees must be authorized or tolerated by the employer. Accordingly, if the employees act against the express orders of the employer, they will still be responsible for their conduct against any other employee.

TERMINATION OF THE EMPLOYMENT RELATIONSHIP

The new law fails to list as causes for termination of the employment relationship the following which were formerly established by law:

1. *Force majeure* or acts of God not imputable to the employer, or the physical or mental incapacity of the employer or the death of the

employer which necessarily results, immediately and directly, in the termination of the need for employment.

2. The notorious and manifest economic impossibility of continuing production.

3. The exhaustion of minerals being extracted in a mining operation.

4. The cases referred to under Article 38 (employment for a fixed period of time or for a specified job, or for the investment of a given amount of capital for the exploitation of mines which lack commercially exploitable minerals, or for the restoration of abandoned mines or mines where work has stopped).

5. Legally declared insolvency proceedings or bankruptcy, if the competent authorities or the creditors decree the total or final closing of the company, or a permanent reduction in its operations.

It should be noted that as in the case of suspension of the employment relationship, the above are considered as "causes for the collective termination of the employment relationship" (dismissal of all of the employees of the employer).

Furthermore, the new law fails to consider express provisions set forth in a contract as causes for the termination of the employment relationship. This is a logical omission since the only causes of termination permitted by the new law for inclusion in an employment contract are those specified in the chapter of the new law which we are now analyzing.

The physical or mental incapacity of the employer is no longer considered a cause for termination of the employment relationship.

INDEMNIFICATION FOR THE "UNJUSTIFIED" RESCISSION OR TERMINATION OF THE EMPLOYMENT RELATIONSHIP

The law sets forth several criteria for determining the amount of indemnification which is owed by reason of rescission (a) by the employer, (b) by the employee, (c) by reason of the refusal of the employer to reinstate certain employees, and (d) by reason of the voluntary termination of the employment relationship.

Before reviewing these criteria, it should be stated that the aforementioned provisions refer only to amounts owing as a direct consequence of the rescission or termination (3 months salary, salaries accumulated between the date of rescission or termination and final judgment by the

Labor Board, and in certain cases, 20 days salary for each year of employment). Other benefits owing to the employee as a consequence of the employment relationship (and not as a consequence of the rescission or the termination thereof) are not considered. These other benefits include the proportional part of vacations and annual bonus earned, salaries owing prior to the date of rescission or termination, overtime not paid, the premium for seniority (to be discussed subsequently), etc. All these benefits, arising from the employment relationship and not resulting from the rescission or termination thereof, must be paid to the employee at the moment of the rescission or termination, whether or not the rescission or termination is justified.

Normal indemnification. This indemnification consists of the payment of (a) 3 months salary, and (b) salaries accumulated from the date of termination or rescission until final judgment by the Labor Board. These payments must be made when the employer unjustifiably rescinds the employment relationship (permanent firing or separation) and when the employer does not duly justify the causes or causes for termination of the employment relationship.

Additional indemnification. In addition to the amounts referred to in the previous paragraph (3 months salary and salaries accumulated from the date of rescission or termination until final judgment), a premium is added to the "constitutional indemnification" equivalent to 20 days salary for each year of services rendered in the following cases:

1. As in the former law, when the employer refuses to reinstate the employee. It should be stated that the employer can only refuse to reinstate an employee who has worked for less than one year (the 1931 law permits a period of two years), and, in any case, regardless of seniority, in cases of employees of trust, a domestic or temporary employees, or if it is proved that the nature of the work performed results in direct and permanent contact with the employer.

2. When the employee leaves his employment by reasons imputable to the employer.

The new law does not consider, within this section, the responsibility of the employer who refuses to submit to arbitration, considered in the 1931 statute. Formerly, this obligation was fulfilled by the payment of three months salary, salaries accumulated from the date of rescission or termination until final judgment by the Labor Board, and twenty days salary per year of employment. It appears that the new law is correct in eliminating this provision since a principle of procedural law is that if

one party refuses to submit to competent authority, the legal process nevertheless continues, with the result that judgment will probably be granted in default against the absent party.

Part II of this study will complete the analysis of the Mexican Federal Labor Law and will be published in the next issue of the *Lawyer of the Americas.*