CHILE

Law and Practice

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1. Introduction

1.1 Main Changes in the Past Year

Apart from the specific – and transitory – rules enacted to confront the current pandemic, the most relevant legislative change in employment law may be the enactment of the Teleworking Law (Law No 21.220), to regulate workers' provision of labour beyond the company's walls.

This law defines the key rights and obligations that should rule teleworking, which had not previously been stated by law. On this ground, Parliament accelerated its enactment to give it binding effect under the pandemic, since many companies had to ask their employees to work from home, extending the duty of care to such places, following the latest provisions announced by the Authority, such as district lock-downs and sanitary barriers.

Stating this law, and beyond the difficulties in its effective implementation because of the pandemic, the Labour Code has sought to give satisfaction to a model that might make employment compatible with family life and non-labour interests. The review and diagnosis of the major targets of this law shall be a forthcoming analysis, once the current health crisis has been overcome.

1.2 COVID-19 Crisis

The legislature has been characterised of late by enacting transitory and specific regulations to mitigate the effect of COVID-19 on employment.

Transitional Measures to Face the Pandemic

Among those laws, the principal purpose of Law No 21.227 was to balance the cessation of productive activity and its economic effects because of the pandemic, and to provide a minimum income level to workers, mainly by giving them access to Chilean social security benefits. This new model shares similarities with the Spanish one, giving workers the possibility of suspending the effects of their employment contract (without dismissal) and alleviating companies' finances by removing the need to pay wages during this period. On another hand, the suspended workers have exceptional access to unemployment insurance payments, which shall replace at least part of the wage they are not receiving. This law also allows companies to reduce working hours and wages, by up to 50%. Those workers will receive a payment of up to 25% from unemployment insurance to cope with the wage reduction.

Draft Laws (Bills)

A bill is being discussed at Parliament which intends to extend maternity leave benefits for working women up to the end of this sanitary crisis. Maternity leave payment covers from six weeks before the child's birth to 48 weeks after, and may last a total of nine months. If the bill achieves an enactment, workers will be able to access up to USD2,890 in subsidies during the extended period.

2. Terms of Employment

2.1 Status of Employee

Worker as a Universal Concept

Chilean legislation does not distinguish between types of workers. The Labour Code provides universal treatment to all those who are under the employer's subordination.

However, there are certain specific rules for workers, especially related to age, characteristics or type of employment. Special regulations in these cases give either flexibility to the Code's paragraphs, or safeguards and protection to some workers.

Special Contracts

Within these distinctions are the so-called special employment contracts, such as those concerning private household workers (domestic cleaning service), dockworkers, cabin crew workers (air transport), seasonal agricultural workers, or arts and entertainment workers, among others.

Other Statutes Regulating Employment in Chile

Beyond the Labour Code, there are also specific employment statutes.

Public officials, council workers, general practitioners (GPs) and staff related to them, and primary and secondary education teachers are all subject to special laws.

2.2 Contractual Relationship

Employment Contract – Generic Regulatory Model

As a common rule, Chilean law establishes a generic employment contract model that is applicable to all workers, but distinctions are sometimes set on working hours, days off and wages. The minimum wage applies to each contract, except in specific cases.

Duration

Employment contracts can be sorted by their duration, into indefinite employment contracts (the general ones) and temporary employment contracts. The latter are issued for a specific term (up to one year for unskilled workers or two years for professional ones) and a particular task, as set in the contract without mentioning the duration for such task.

Formalities
Employment contracts are consensual, with the mere agreement of the parties being sufficient to bring a contract into existence. However, the law obliges the employer to extend it in writing, failing which the worker, as a legal assumption, will be able to affirm that the content of such contract is whatever he or she states. Obviously, a Tribunal might consider how reasonable the worker's statement is, according to the particular job.

An employment contract must contain minimum clauses relating to the place and date of issue; the individualisation of the parties; the functions agreed and the place where they will be performed; the wage; shifts or working hours; and duration. It can also include any other benefits or stipulations not prohibited by law.

2.3 Working Hours

Working Day
As a general rule, the maximum allowed working day is ten hours. A working week can reach up to either 45 hours distributed over no fewer than five days or no more than six, or 30 hours, depending on whether it is a full-time or part-time job.

Overtime
Part-time jobs are subject to the same rules as full-time jobs, except they cannot exceed an equivalent of 2/3 of the maximum of daily working hours for full-time jobs; the minimum wage can be reduced accordingly.

Lower Flexibility
The daily or weekly maximum hours may be extended by overtime agreements. The Labour Code limits overtime to a maximum of two hours per day (12 a week), requires the previous agreement to be in writing, and shall be extended under exceptional circumstances. The agreement cannot surpass a three-month period, but this is renewable.

2.4 Compensation

Minimal and Compulsory Rules about Wage Payments
Chilean labour law states some minimum and mandatory standards regarding the payment of wages, such as a minimum wage for full-time jobs (equivalent to USD400 per month). If a company receives annual profits, it must share up to 30% of it with all workers, in proportion to their annual wages.

The minimum wage is modified at least annually, following adjustment patterns for both economic growth in GDP and the effect of the previous year's inflation. This might be the only State intervention regarding the fixing of wages.

Other Employee Compensation
Beyond these obligations, employment agreements might regulate a compensation structure through the intervention of either workers or trade unions. With executives or high-level workers, this negotiation may exist through direct agreements. For lower-qualified workers, such a system of negotiation, discussion and agreement will apply mainly and exceptionally if there are trade unions involved.

2.5 Other Terms of Employment

The Deal Beyond the Minimum Law Framework
The Labour Code refers to some irrevocable rights, whereby parties shall agree on complementary elements either by improving or innovating salaries, leaves, applicable or special clauses, and so on, as far as they do not infringe employees' guarantees.

For example, the law gives 15 paid days off to each worker when he or she has been employed by the company for over a year. Employer and worker, however, could increase those days or pay vacation bonuses beyond the framework of the legislation.

Leave
The law regulates maternity leave covering six weeks before delivery and 48 weeks after). Throughout this period, the worker's wage will be replaced by a public or private benefit. Similarly, there is an illness leave allowing the worker to stay at home if justified by a medical certificate. The worker's health insurance will pay for the recovery period. The Labour Code also regulates other permits that might involve payment, including a five-day leave for the birth of a child (for male workers), leave for the death of a parent or partner, and leave to undergo annual medical examinations. Unpaid leave examples include leave to fulfil military service, during which time the employee's job is saved.

Confidentiality, Non-discredit and Non-compete Clauses
Confidentiality, non-discredit and non-compete clauses are admissible in employment contracts, but are subject to some limits. For example, confidentiality clauses must have the purpose of safeguarding the information that the employer qualified as such (in advance), and only cover the contracting period. The effects will usually be more restricted after this period, since the expiry date has to be set from the beginning, otherwise such clauses will be against the constitutional right to obtain employment. Clauses regarding worker's responsibility are admissible as long as they are connected to the functions performed by the worker. If the employer claims a breach of such clauses, it will be necessary to go to trial to prove the worker's liability.

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3. Restrictive Covenants

3.1 Non-competition Clauses

Non-compete clauses are valid within the autonomy conferred on the parties by the legislation. An employer can dismiss a worker who breaches such a clause, without severance pay, either personally or through related persons. These clauses would also come into force between the expiry date of the employment contract and a later one if they comply with the following requirements set by jurisprudence:

- they have short or medium-term limits, excluding any indefinite agreement on this point; and
- they provide for a compensation payment for the loss of opportunity that may arise from not competing with the former employer.

If a non-compete clause does not satisfy these requirements, a tribunal may resolve that such a clause is against the Constitutional right to work by impeding the employee's ability to obtain a new job elsewhere.

3.2 Non-solicitation Clauses – Enforceability/ Standards

Non-solicitation clauses are not common within the contracting systems. One exception is under Article 160 No 2 of the Labour Code, whereby workers might be dismissed if they compete directly with an employer's business, without the right to severance, but this clause is uncommon.

4. Data Privacy Law

4.1 General Overview

General Rules

The Political Constitution states the obligation to respect and protect private life and personal and family honour, and likewise to protect personal data (Article 19 No 4).

Beyond labour regulations, Law No 19.628 "About Protection of private life" was enacted in 1999 and set out the legal framework under which individuals must build their relations concerning this matter.

One of the most important topics covered by Law No 19.628 is the treatment of personal data in public registers, by either public or private bodies.

Because firms have preferential access to employees' data, one aim of Law No 19.628 is to regulate the collection, storage and use of employees' personal data by companies.

According to the law, any piece of information concerning identified or identifiable natural persons qualifies as personal data. The treatment of this sort of information can only be permitted when the law allows it, or when the person (rights' holder) allows it in writing. Nevertheless, if the personal information is provided by sources available to the public, there is no need for authorisation.

Labour Law Sphere

Focusing on labour law only, Article 154 bis of the Labour Code replicates the content of the above law by mandating employers to shield personal employees' data which has been accessed in the context of employment relations.

There is no direct sanction for breaches of employee's privacy, but the infraction of the right can be settled by a general procedure protecting workers' fundamental rights (Article 485 et seq of the Labour Code), either related to an ongoing labour relationship or in a dismissal instance.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

Foreign Workers in the Labour Code

Foreign workers have the same employment rights as any national worker. Nevertheless, Article 10 of the Labour Code states that the employment contract must indicate the nationality of the worker, among other mandatory information.

Following this, there is a specific chapter of the Labour Code dedicated to the nationality of workers, which states that at least 80% of employees working for the same employer must be of Chilean nationality. This rule does not apply when the company maintains 25 or fewer contracted employees.

Criteria to Take into Account

To reach this 80%, the law provides the following criteria:

- all workers contracted by the same employer in the country must be taken into consideration;
- specialised technical staff should be excluded from the rule – according to the Labour Office (Opinion No 6.307/282, 14.11.96), this includes any qualified staff member who employs skills or knowledge considered to be at a top level of specialisation or study; and
- any foreigner that either is married or has signed a civil agreement with a Chilean national, or who is the parent of a Chilean child, will be considered a Chilean national.

5.2 Registration Requirements

Although there are no direct registration requirements in order to employ them, foreign workers must have a resident status in order to be legally hired.

One of the temporary residence permits is the so-called "visa subject to employment contract", which gives a foreign holder the right to stay and live in Chile, as long as they remain with the same employer.

If the foreign worker has a "visa subject to employment contract", his or her employment contract must contain a special paragraph where the employer obligates itself to pay for both the worker and their family's returning ticket to the departure country.

Also, because the visa will usually be issued because the employee has a contract with a particular employer, that employer must give notice to the Foreign Affairs Department (Ministry of Foreign Affairs) if the labour relationship ends.

There are other types of permits that allow working, but the "visa subject to employment contract" tends to be the more common among foreigners who wish to work in Chile.

6. Collective Relations

6.1 Status/Role of Unions

Trade Unions in the Labour Code

Trade unions can be sorted by either the type of company they belong to or the services they provide. In this regard, Article 216 of the Labour Code considers the following:

- the company union, grouping workers of the same company;
- the intercompany union, grouping workers hired for two or more employers;
- the own-worker union, grouping workers that have no dependence on any employer; and
- the eventual worker union, grouping workers that work occasionally or cyclically.

The above definitions are the basic union structures, but workers can choose other forms of organisation, according to their interests, in order to assure their autonomy and freedom.

Trade Union Purposes

Article 220 of the Labour Code states the following fundamental purposes of a union:

- representing its members in collective bargaining, signing collective agreements, looking after the fulfilment of agreements and exerting the rights borne out of such agreements;
- providing representation to members when so required;
- defending members' labour and social rights, and filing complaints in cases of infraction;
- acting as a party in any lawsuit related to anti-union behaviour;
- assisting union members;
- promoting members' education;
- channelling inquiries and facilitating members' needs for working integration in the company;
- collaborating in the reduction of accidents and illness related to work conditions;
- making up or taking part in co-operative health associations;
- improving the employment level and taking part in job placement; and
- performing whatever activity not forbidden by law.

In this regard, trade unions have a goal to assist their members in matters concerning their labour and social security rights, acting as an active counsellor and advocating for the best interests of their members.

Proscription of the Company's Unlawful Intervention

To enable unions to achieve their goals free from pressure, intimidation, harassment, threats or efforts to discredit them or their leaders, the Labour Code provides several measures to avoid and sanction any unlawful intervention by a company, in line with the Political Constitution of the State (Article 19 No 19), which provides for complete autonomy.

Therefore, Articles 289 et seq mention some conducts or actions that can be considered anti-union practices, contrary to the freedom of association embodied in the right to unionise. The Labour Office and Unions can prosecute such conducts. If found guilty, the company will have to pay a fine and will be excluded from performing contracts with the State for two years.

Unsettled Disputes

There is no internal company structure set by law that assures a direct channel of communication between unions and managers or executives. Therefore, unions cannot count on any formal way to defend members' interests, excluding collective bargaining and mediation processes carried out through the Labour Office.

The Law Reform of 2016

The law reform of 2016 (Law No 20.940) tried to enhance the role of the union by remarking on the concept of "Recognition of exclusive bargaining agents".

From here, it was debated if trade unions were the only entity entitled to agree with employers on a collective agreement, excluding groups of employees joined only for such purpose.

Nowadays, non-union groups of workers can negotiate collective agreements, but that document does not have the same approbation procedure as a union agreement, so employees have the freedom to establish organisations of their own choosing and the right to agree on common working conditions with employers without necessarily involving a trade union.

Trade Union Figures
The law reform of 2016 also sought to increase the number of unions, considering that just 15.5% of workers were unionised in 2011; by 2018, that figure had increased to 20.6% (source: Labour Office).

It must be added that public institutions defend a social climate that guarantees the respect and protection of unions and union members, so trade union rights are exercised in normal conditions and in a climate of complete security.

6.2 Employee Representative Bodies

Trade Union Board
Unions are represented by a union board formed of members elected through official elections.

One or more union leaders will have labour immunity, depending on the number of members in the union. Such immunity will protect the leader while they are in position, and for six months after they leave the post.

The requirements to become a union board member are set out in the statutes of the organisation, which is a public document written by the same union and will define the obligations of both members and the trade union.

Time to Dedicate to Trade Union Purposes
The law allows union officers to dedicate at least six hours per week to union tasks, each month (or more depending on the number of union members), through the so-called working union hours. Such time will be paid by union funds, unless the employer and the union have agreed otherwise. Even under the statutes, trade union officers could be excluded from working for the employer to focus solely on the union's affairs. Meanwhile, the employer must maintain the officer's job and consider the above time as having been effectively worked.

The non-working hours provided to union officers facilitate the fulfilment of union goals and allow them to perform trade union functions, within the terms agreed in law and by the statute.

Beyond the Traditional Union Officer Role
Union officers handle unwritten tasks when unions have an active role in the company's structure, such as requesting the employer to report all dismissals of union members and obtaining information about the reasons for such.

Related to other activities union officers can carry out, the law entitles them to ask for company financial information, including a list of the salaries paid to each worker, either periodically or for collective bargaining purposes.

Higher-Level Organisations
The Labour Code recognises other organisations, such as federations of trade unions (groups of unions), confederations (bigger organisations grouping federations) and National Trade Union Centres grouping federations, confederations, trade unions and groups of public officers.

6.3 Collective Bargaining Agreements

Collective Bargaining Agreement's Content
The Labour Code regulates the process, form and content of collective agreements, their legal force and binding effects, and also when and how to register the agreements at the Labour Office.

As a formality imposed by law, collective agreements must be issued in writing, indicate the parties and be signed by them, and state both the date on which the agreement is to come into force and the date of expiry (from two to three years). The agreement will also refer to salaries, benefits, working conditions, and so on, excluding affairs related only to the organisation and development of the employer's business.

By law, the parties must agree on whether or not to extend all or some of the collective agreement's benefits to non -unionised employees.

After the parties' signature, the agreement has to be registered at the Labour Office.

Enforceability of the Agreement Beyond its Expiry Date
The agreement will be considered to incorporate the terms of any contract or agreement in force, or concluded subsequently between the parties. Therefore, a collective agreement will continue to be binding even after it expires, since its terms will be deemed to be included in the employment contract of each trade union member.

Controversial Interpretation
If either the trade union or the employer believes that the agreement does not conform with the minimum standards laid down by law or that there are controversial interpretations of it, they

may present the complaint to the Labour Tribunal, which will solve the conflict.

7. Termination of Employment

7.1 Grounds for Termination

According to Articles 159, 160, 161, 162, 168 of the Labour Code, the employer must communicate the specific grounds for termination and the facts that support it.

The grounds for termination are as follows:

- Article 159: the employment contract will terminate in the following cases:
  - (a) through mutual agreement between employer and employee;
  - (b) upon the employee's resignation;
  - (c) upon the employee's death; or
  - (d) by the expiry date of a fixed-term employment contract, although a fixed-term employment contract will become open-ended in the following scenarios:
- if the employee continues to work after the expiry date;
    - (i) if the employee has worked on and off for 15 months or at least 12 months for the same employer and under two or more contracts; or
    - (ii) if both the employer and employee agree on a second renewal of the contract;
  - (e) at the end of the job or services that gave origin to the contract; or
  - (f) due to a fortuitous case or force majeure event.
- Article 160: the employment contract will end without compensation if the employer invokes one or more of the following grounds:
  - (a) any of the following improper, serious and duly verified conducts:
    - (i) employee's lack of probity in the performance of his task;
    - (ii) sexual harassment;
    - (iii) employee's physical acts against the employer or any employee of the same company;
    - (iv) employee's slander against the employer;
    - (v) employee's immoral conduct that affects the company where he or she works; or
    - (vi) labour harassment;
  - (b) if the employee conducts business in the same trade as the company's, which was previously prohibited in the employment contract by the employer;
  - (c) if there is absence from the workplace without justification for two days in a row, two Mondays in the month or any three given days in the same period, or absence without cause or previous notice by any employee in charge of an activity, chore or machine whose abandonment represents a serious disruption to the progress of work;
  - (d) an employee's abandonment of work, such as an untimely and unjustified exit from the workplace during labour hours, without the employer's previous consent or an unjustified refusal to work on the tasks agreed in the employment contract;
  - (e) acts, omissions or gross negligence that endanger the safety or functioning of the establishment, the safety or activity of the other employees, or their health;
  - (f) material damage done deliberately to installations, machinery, tools, working tools, products or merchandise; or
  - (g) a serious breach of duties imposed by the employment contract.
- Article 161: the employer can end the employment contract by affirming in writing that the company is facing needs related to its own rationalisation or modernisation, lower productivity, changes in either the market or economy, or all of the above, which make it necessary to dismiss one or more employees.

If the employee is entitle to represent the employer (such as managers, assistant managers, agents or representatives) and has general administration powers over the company, he could be dismissed by eviction.

Both company needs and eviction require a notification letter to be issued 30 days in advance, with a copy sent to the Labour Office.

Nonetheless, the above notice period might be circumvented by paying a compensation equal to a wage.

In general, there is no mandatory dismissal procedure apart from for sexual harassment claims, as contained in Article 160, in which case, according to Article 211-A and subsequent articles thereof, the employer must conduct an investigation or send the complaint to the Labour Office.

Collective redundancies are neither prohibited nor regulated by a specific procedure. Consequently, dismissed workers can sue the employer personally or by a common attorney on behalf of all of them.

7.2 Notice Periods/Severance

There is a notice period for the grounds of termination established in Article 161 of the Labour Code, but this can be circumvented by paying an economic compensation on top of the severance for years of work.

According to Article 162 of the Labour Code, the dismissal must be made in writing and delivered in person or by certified mail to the employee, and it must contain the specific grounds for termination and the facts that support them. Likewise, it must inform the employee whether their social security contributions are paid for the period between the starting date of the contract and the month before the dismissal, with a certificate of payments made by the correspondent institutions. The employer must also inform the employee of the severance payments involved, in writing.

No general external authorisation is needed, except for workers who are protected from dismissals by union law or maternity rights. In those events, according to Article 174 of the Labour Code, the employer must obtain authorisation from a competent judge before the dismissal.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

The Labour Code contains no definition of summary dismissal or dismissal for serious causes in the private sector, nor regulation thereof. The only way for public servants who are not elected or are employed at the exclusive confidence of the service's chief to leave office or employment is through a summary dismissal regulated in the administrative statute – Law No. 18.834, Article 119 et seq.

The procedure considers the administrative inquiry led by an administrative attorney, who gathers evidence and gives the defendant the opportunity to make his case. With all the evidence, the administrative attorney makes a recommendation to the head of the institution, suggesting to absolve or sanction the public servant. If he decides to sanction, there are four options:

- censure;
- fine;
- suspension from office for between 30 days and three months; and
- dismissal.

The decision is made by an administrative act that can be appealed and examined by the Comptroller General.

7.4 Termination Agreements

Termination agreements are permitted under Article 177 of the Labour Code, with the following formalities for validity:

- the agreement must be in writing;
- the agreement must be signed by both parties;
- the employees must sign in the presence of the union's president or delegate, labour inspector, public notary, officer of the official register or a city clerk; and
- all the employee's social security contributions must be paid by the employer.

In Chile there are no enforceable releases because the employee has the right to make a legal reserve on the termination agreement.

Regarding other limitations on termination agreements, if the social security contributions are not paid, the termination agreement is voided. Likewise, any clause that goes against public law rules is void.

7.5 Protected Employees

There is protection against dismissal based on union and maternity protection laws.

In the case of union laws, according to the existing regulation in Chapter III of the Labour Code, there is permanent protection for union representatives and temporary protection in the following three situations:

- at the time of the constitution of a union;
- at the time of the representative's election; and
- at the time of collective bargaining.

In the case of maternity protection laws, women have protection from conception until one year and 24 weeks after the birth of the baby.

In both cases, according to Article 174 of the Labour Code, the employer must get authorisation from a judge for the dismissal of the employee. The judge not only needs to rule on the merit of the grounds for termination, but he also needs to balance those grounds against the protection and the reason behind it. That is why a judge can still deny the authorisation even if the employer proves the grounds.

8. Employment Disputes

8.1 Wrongful Dismissal Claims

There is one procedure for all wrongful dismissal claims, which is regulated in Article 446 of the Labour Code et seq. This procedure may be different if the termination involves an impact on specific human rights or union freedom, in which case those articles are complemented by the regulation in Article 289 of the Labour Code et seq, Article 403 of the Labour Code et seq, and Article 485 of the Labour Code et seq.

Nonetheless, an employee lawsuit does not need to be substantiated because, according to Article 454 No 1 of the Labour Code, the employer has the burden of proof of the grounds for termi-

nation. In this situation, claims need to address facts presented in the letter of dismissal only if the employee needs to explain something, but he can also deny all facts.

That being said, if the conflict focuses on the understanding and interpretation of the law, then both sides have to explain and substantiate their positions.

The consequences of a wrongful dismissal claim are stated in Article 168 of the Labour Code, which stipulates the following options:

- if the grounds for termination are found in Article 161 (see **7.1 Grounds for Termination**), the severance paid for working years fulfilled increases by 30%;
- if the grounds for termination are found in Article 159 (see **7.1 Grounds for Termination**), or if the employer did not invoke any grounds, the severance paid for working years fulfilled increases by 50%;
- if the grounds for termination are found in Article 160 (see **7.1 Grounds for Termination**), the severance paid for working years fulfilled increases by 80%; and
- in any of the previous options, if the judge decides that there was no plausible motive for the dismissal, the severance paid for years of work increases by 100%.

8.2 Anti-discrimination Issues

According to Article 2 of the Labour Code, discriminatory acts are distinctions based on race, colour, sex, maternity, breast-feeding period, nursing, age, civil status, syndication, religion, political stance, nationality, ethnic background, socio-economic status, language, belief, participation in guild organisations, sexual orientation, gender identity, parentage, personal appearance, disease or handicap, or social background, whose goal is to cancel or alter equal opportunities or the treatment of employment. Article 19 No 16 Section two of the Chilean Constitution prohibits any discrimination that is not based on personal skills or capabilities – in other words, a broader sense of what is discrimination.

Claims made based on discrimination are regulated in Article 485 et seq of the Labour Code, and can occur during the employment relationship or upon the dismissal.

Regarding the burden of proof, Article 493 states that the employee only needs to prove signs of discrimination, in which case the employer must explain and prove the base of the measure adopted and its proportionality.

The applicable damages or relief depend on the moment of discrimination. Article 495 of the Labour Code states that the judge must order the end of discriminatory acts and measures to repair the consequences of the act, including compensation, and must fine the employer according to the law. If discrimination occurs upon the dismissal, Article 489 establishes compensation of from six up to 11 salaries, as determined by the judge.

9. Dispute Resolution

9.1 Judicial Procedures

In Chile, there is a specialised employment tribunal that is ruled by a particular Chapter of the Labour Code and delegates employment conflicts to Labour Tribunals, which are located in every capital department and the most important cities; there are also four salaries and social security Debt Tribunal. The remaining counties have Ordinary Tribunals to deal with labour matters.

The Labour Code states both a general labour procedure and special ones, both of which could secondarily apply a common law forum (Code of Civil Procedures) that institutes the same common procedure principles: the use of oral procedures, concentration, publicity, contradiction, continuity and non-intermediation.

Labour General Procedures are composed of two hearings: one preparatory and the other "of trial", after which the judge must provide a sentence.

Regarding special procedures, there is a labour tutelary to protect workers' human rights violations either during the labour relationship or upon dismissal, which has the aim of reducing the worker's burden of proof in the trial. On this ground, the worker's claim can be constructed just by cognate facts. According to Article 407 of the Labour Code, both anti-union and unfair practices will be sustained through the aforementioned procedure.

Also, there is a payment procedure to address small payment and small offence claims, which have just one hearing.

Even though the Labour Code does not deal expressly with the concept of class actions, they are allowed because of the secondary application of the Code of Civil Procedures, and it is common for two or more workers to file a lawsuit under the same complaint.

Despite the trade union having rights to represent its members, members can go to trial as a collective when they claim a general breach of an employer's duties, giving their consent to a common lawyer.

Only attorneys can litigate in labour trials, as long as they have been designated by the party for such trial, in writing. Other lawyers can also be named to act together, or separately to the first one.

Lawyers can have general or wide powers to represent claimants. The first powers are embedded in the designation, while the second ones must be conferred expressly. Nevertheless, a simple designation is enough to settle the dispute in the trial, but wide powers are required in order to sign non-judicial settlements, and to allow a lawyer to receive any payment from either the settlement or the sentence.

9.2 Alternative Dispute Resolution

By the general rules of the Code of Tribunals, judicial arbitration is only possible in collective bargaining matters.

Chapter IV of the Labour Code is called "About Collective Bargaining", and covers voluntary arbitration and mandatory arbitration. In the former, trade unions and employers' representatives can ask for arbitrators' intervention. Mandatory arbitration will operate in two situations: when companies are excluded by law from going on strike, and whenever the Tribunal orders employees to desist with the strike and go back to work in order to avoid causing risk to the population's health, environment and supply of goods and services, or to the national economy and security.

Whether it is voluntary or mandatory, the procedure for arbitration must follow the Regulation of Labour Arbitration stated in Decree No 16 of the Ministry of Employment and Social Security of 14 February 2017, according to which an arbitral settlement subscribed without considering a labour arbitral procedure could not be demanded at a trial, since just an arbitral sentence performed in such a manner is valid.

9.3 Awarding Attorney's Fees

In the Chilean labour procedure, the judges determinate whether a party pays the costs of the trial or not, and the amount of such costs. However, each party shall agree the labour fees with his or her lawyer, considering they are not set by law. Although the recovery proceedings for non-payment are established by law, there is no chance of compelling the adversary to pay for such an amount.

Similarly, the Labour Code states in Article 459 No 7 that the sentence must indicate the amount of tribunal fees and explain if the losing party shall pay them or not. In the same way, any tribunal resolution capable of finalising a procedure shall decide about labour and tribunal fees, and the amount of each one.

In labour procedures, there is a so-called "exception of payments principle" covering any actuation made by tribunal officers. Likewise, the law gives any party living in poverty the "privilege of poverty" to get free legal representation.

However, if a Tribunal imposes the tribunal or lawyer fee payments on a party, the amount of such payments will be low.

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Trends and Developments

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Factors that have introduced new challenges that need to be addressed by labour law include globalisation, technological advances, the gig economy, the need to increase productivity, and the reconciliation of working and family life. In this regard, Chilean labour law is currently facing three issues: home-based work and telework, labour regulation of the gig economy, and labour flexibility.

The New Regulation of Home-Based Work and Telework in Chile: a Law for the Health Crisis

The severe worldwide health crisis caused by COVID-19 has affected the way people have had to work, as most people had to shut themselves up in their homes to prevent the spread of this harmful virus among the population. Therefore, without the possibility of working in person at a company, working from home became the only way of continuing productive activity. Thus, workers migrated to a virtual provision of their services, using the available technology. The use of videoconferencing as a means of holding meetings became commonplace, as did the more intensive use of chat programs, electronic messaging, mobile telecommunication, tablets and computers. All of these devices, tools and applications are connected through the internet and wireless networks in workers' homes.

In Chile, the health crisis caused by COVID-19 accelerated the processing of the bill for home-based work and telework, which was approved as Law No. 21.220.

According to the new law, it is necessary to distinguish between two forms of remote working: home-based work and telework. Home-based work is where the worker renders services totally or partially from a place other than the company's facilities, while telework is where services are provided through the use of technological, computer or telecommunications means, or if such services must be reported through these means. In the end, the new law establishes the use of computer resources as a distinctive element of both forms.

The workplace may be the home of the worker or of a third party, or a place freely chosen by the worker. The new law will not be applicable if the employer determines the place where the worker must work.

The new law allows the parties to agree on a working time, in which case the employer must implement an attendance record. In exceptional circumstances, a teleworker can freely distribute their work hours and does not have to adhere to specific working hours. Home-based work may cover all or part of the working time, combining working hours in person at company facilities with working times outside of it.

The new law establishes the worker's right to digital disconnection, whereby the employer must guarantee a period of at least 12 continuous hours in a period of 24 hours in which the worker will not be obliged to respond to communications, orders or other requirements. Additionally, the new law expressly indicates that in no case may the employer establish communications or make orders or other requirements on workers' days of rest, days off or vacations. This is a new feature in Chilean labour law, and it imposes severe restrictions on any employer who fails to honour their workers' right to rest.

The new law and its regulations oblige the employer to ensure health and safety conditions in the workplace, even though this may be the worker's home.

Equipment, tools and materials for telework, including personal protection items, must be provided by the employer to the worker. Likewise, the costs of the operation, maintenance and repair of equipment will be financed by the employer.

The new law has established that either party may unilaterally return to the conditions originally agreed in the employment contract, if a minimum of 30 days' prior written notice is provided to the other party. This reversibility right will only proceed when the parties have agreed on the teleworking modality after the start of the employment relationship. This right has generated a certain degree of uncertainty, given that any change in the company's facilities could make it difficult or impossible for the employee to return to the same conditions before agreeing to the telework format.

The new law regulates telework in detail and depth, and implies a great advance in modernising Chilean legislation, making it more flexible. The extent and concrete effect of the new law can be evaluated once the COVID-19 health crisis has ended, at which point workers, unions and employers may agree to work remotely without the pressure of circumstances, and the labour judges and the Labour Supervisory Authority may apply and interpret the new law to specific cases.

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This new law marks a milestone because it is the first labour reform in Chile that addresses the new working conditions driven by technological advances that allow people to work anytime and anywhere. However, it will be necessary to be aware of the problems that these forms of working generate in terms of the invasion and contamination of family and personal life by work, as well as the social effects that will be produced by the physical disintegration of companies that are currently a core source of social relations for the people who work there.

Sharing Economy and Labour Law: Employee or Self-Employed Person?

A business model that has broken with force into the world is the "Sharing Economy", which refers to virtual platforms such as Uber, Airbnb, Glovo or Rappi. These digital applications have invited us to rethink our economic, social and cultural relationships. The legal field has not been the exception, as new problems have arisen that must be addressed by law, including labour law.

Initially, the terminology of a "collaborative economy" referred to businesses that took advantage of underutilised assets of individuals for non-profit purposes. However, with the passing of time, virtual platforms began to appear with a purpose that was not altruistic, but with an economic interest in the use of the application – eg, Uber, Cornershop and Airbnb. These new platforms have led the legal doctrine to wonder if there really is a working relationship on these platforms.

With respect to this topic, the specialised literature has more or less unanimously established that only certain platforms in the "collaborative economy" have problems of a labour nature – ie, those applications where the system acts as an intermediary between a professional and a consumer, thereby establishing commercial conditions for the transaction, known as "economy on demand" (eg, Uber, Glovo, Uber Eats, Rappi or Cabify). As a counterpart, it has been argued that in those applications where there is merely a connection between two people, with no intervention by the platform, there is no point in discussing the eventual working relationship (Airbnb, Blablacar or Verkami).

Taking this as a starting point, meaning that there is only a work discussion in the economies on demand, it has been argued by the legal doctrine in Chile if, indeed, there is a work relationship. Specifically, five ways of understanding the problem have been proposed.

The first position has held that, in these applications, the person performing the service is a dependent worker, and the regulation of the ordinary and common employment contract must be applied to it. This has been argued by virtue of two considerations: first, the employment contract is the optimal instrument to ensure decent work for workers, and, second, all the workers who work on these platforms perform functions independently.

A second proposal has argued that the people who work on these platforms are workers but that the labour legislation is not applicable "en bloc", and a "special contract" should be generated with the purpose of regulating only certain minimum contents of the service provider – ie, minimum remuneration, limitations on working hours and social security coverage. Thus, there has been talk of "dependent workers with special contracts" in the economy on demand.

A third alternative has indicated that a sort of "third way" should be applied to the people who provide the service, making such intermediate figures of comparative law as the Spanish economically dependent worker (TRADE), the Italian *parasubordinato,* the German *employee* or the English *worker* applicable.

The fourth, most liberal posture has held that there is no employment relationship in these cases, as there is no subordination of the service provider to the platform. In this way, it has been argued that the service provider has full freedom to determine the working day and the place and content of the work; it is the user who chooses the service provider and qualifies it; there is a direct relationship between the service provider and the user; and there are certain autonomy notes, such as the establishment of mere general recommendations, among other aspects.

Finally, it has been argued that it is necessary to distinguish between two markets in order to answer the question of the employment relationship in the economy on demand: the people transport market and the food delivery market. Thus, it has been stated that there is only one working relationship in the food distribution market (Glovo, Deliveroo, Rappi, Uber Eats), and not in the people transport market (Uber, Cabify, Lyft, Beat, among others), because there would be greater control of the platform in the provision of services carried out in the food delivery market since it decides how to work and at what pace.

There are two bills currently addressing this matter in Chile.

Sebastián Piñera's government sent a bill on 14 May 2019 (Bulletin No. 12.618-13), proposing that digital applications do not give rise to an employment contract, as long as natural persons do not have exclusivity and are free to determine the opportunity and time they will allocate for the provision of such services. In principle, with this legislative proposal in applications such as Glovo, Uber or Rappi, an employment relationship would not occur.

The second bill is an initiative of four government and opposition senators presented on 13 May 2020 (Bulletin No. 13.496-

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13), which has proposed that all people who provide services in digital applications are "dependent workers" with the following special requirements:

- a minimum hourly wage;
- work accident insurance;
- disability and survival insurance;
- the employer's obligation to contribute to unemployment insurance; and
- the employer's duty to train or educate platform workers.

In summary, the legislative debate is open in Chile. For now, in the absence of regulation, it will be the task of the labour judges and the Labour Supervisory Authority to determine whether or not there is an employment relationship in the specific cases presented, and under what terms.

Making Labour Law More Flexible: an Indispensable but Difficult Task

So-called labour flexibility can be defined as a productive restructuring that generates transformations in the relations and contractual obligations between employer and worker, which means a change in the organisation of work, maximising productivity and efficiency within the company. Indeed, the strategies used in the productive restructuring generate new conditions, whether cultural or economic, that allow both parties (worker and employer) to adapt to a new productive scenario.

Therefore, labour flexibility must not only be related to greater productivity but must also allow the worker to find a point of balance in their work relationships, reconciling both their professional and personal lives. This is highly relevant to the extent that various studies have shown that the productivity and performance of workers increase considerably when people are comfortable in their jobs, bringing about a positive change in culture and/or mentality within the company by allowing the reconciliation of labour relations and personal life, producing certain mutual benefits such as increased productivity, reduced absenteeism, improving the work environment and the retention of existing personal talent.

In accordance with the above, it is necessary to analyse the present challenges in Chile in terms of labour flexibility or adaptability entailed by the modernisation of the labour market and new forms of work, so that workers can benefit and improve their quality of life in and out of work. Likewise, labour flexibility will assist new groups of workers who have historically found it difficult to gain certain jobs, such as young people, women, people with some degree of disability or older adults.

The most relevant labour flexibility matters that require revision in the legislation include the flexibility of working hours; decreases in the cost of dismissal; special student worker employment contracts; and better training and preparation for workers.

Making working hours more flexible: a pending task in Chile

The Chilean Labour Code currently establishes a fairly rigid work day, maintaining certain maximums and minimums as appropriate): 45 hours per week distributed in no fewer than five days and no more than six days, with a limit of ten hours a day.

Taking this into consideration, a new way of establishing a working time has been proposed by Sebastián Piñera's government. In particular, the bill proposed by the government suggests that the parties to an employment contract can establish a 180-hour monthly working time distributed by mutual agreement, with the following limits:

- services may not be provided for more than six continuous days of work; and
- in any case, it is established that the worker may not stay in the workplace for more than 12 continuous hours, considering working time, extraordinary hours and rest.

The project also proposes that parties can agree on a working time of four days a week, rather than the five or six days contemplated by the current Chilean Labour Code.

In this way, the regulation enables the Labour Law to address flexibility, allowing the parties to the labour relationship to agree on better work schedules.

However, although the project is moving in the right direction, towards making working time in Chile more flexible, there is a suggestion that it should also be accompanied by a reduction in working time. According to OECD data, Chilean workers work an average of 1,914 hours a year, making Chile one of the OECD countries with the longest working times.

In this way, a proposal should be established that reconciles greater productivity (making working time more flexible) on the one hand, with an improvement in the quality of life of the worker (fewer hours of work) on the other.

Severance payment for years of service: the "Austrian Backpack"

According to statistics from the Ministry of Labour, Chile is ranked as one of the countries with the greatest rigidity when it comes to dismissing workers. Indeed, according to data from the World Economic Forum, Chile ranks 112th out of 137 countries, with the cost of dismissing a worker being 26 weeks of salary, while the OECD average is 14 weeks.

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Although the severance payment for years of service means that the employer cannot freely dismiss a worker and thus protects the so-called principle of work continuity, such compensation is highly expensive, since it disincentivises older workers from changing to other employers, for fear of losing some or all of that compensation, while it makes it harder for employers to decide to end an employment relationship due to a probable judgment on the process and the risk of a higher severance payment.

In consequence, it is sought to present a bill that will modify the current compensation system, expanding the number of workers who can access a severance payment for years of service for the termination of the employment relationship, but in turn restricting the eventual judicialisation of the process in the event of a claim by the worker due to this fact. This would be an alternative to the current system, which is financed with a monthly employer contribution that allows for compensation for the termination of an employment relation with respect to new hires and does not affect former workers in any way, so the compensation would apply at the termination of the employment relation in any event.

One option for this problem is the so-called "Austrian backpack" – ie, the Austrian system that allows a worker to be dismissed with an all-event severance payment of 1.53% of the gross salary, financed by the employer.

Special contract for young students

Young students are especially marginalised in the Chilean labour market, so a special contract that favours the formalisation of work for young workers has been created, to facilitate their incorporation into the world of work. The contract introduces an interruption to the working day, to allow these students to better reconcile work with their studies. The special contract will also allow workers who are students to maintain their status as the beneficiary of family allowance, to maintain their status as a legal burden in the health system, and to maintain other social benefits that they may currently possess, as they are formally hired and receive remuneration for it.

In Chile, an attempt has been made to promote the work of younger people through Law No. 21.165, which allows for a part-time agreement with student workers – ie, fewer than 30 hours per week. However, it seems that the regulations have not had an impact on the Chilean labour market as there is still very low employability for young students. Thus, it is imperative that Chile establishes new public policies that promote the work of younger people, including the creation of a special employment contract for this segment of the population.

Better training and preparation of workers

The training system currently in place in Chile has remained almost unchanged for decades, and appears to be ineffective for the development of skills that workers require to face new labour challenges, considering that the labour market is very different from that which existed years ago, being more modern and technological.

The task will consist of addressing how Chilean workers can be better and more effectively prepared to insert themselves into the current and future work scenario, in which technology, new forms of work and, above all, the fact that many of the tasks carried out by workers are already being modernised, modified and automated – with the design and implementation of new training taking on vital importance – are aligned with the new labour challenges that may arise in the future.

In consequence, as has been seen, the Chilean labour legislation contemplates different aspects that should improve the flexibility of working hours; decrease the cost of dismissal; implement a special student worker employment contract; and provide better training and preparation for workers.

However, we must not lose sight of the fact that all these proposals must be accompanied by a regulation that allows workers to reconcile their work life with their family life, which in modern times seems to be increasingly difficult.

Conclusions

Chilean labour legislation has incorporated the regulation of telework and home-based work as a way to allow workers to work wherever they please and at the time of their choice as an immediate response to the consequences of the COVID-19 pandemic. The good news is that this legislation will continue in the future.

The regulation of work on virtual platforms is under full legislative debate, although there is a consensus that service providers deserve minimal labour and social protection. In times of pandemic, delivery people have continued to work and enable supply to the confined population. Therefore, it is completely reasonable that the legislation grants them, at least, access to insurance for occupational risks.

The task of making Chilean labour legislation more flexible appears to be a difficult problem to solve. Some progress was made with the special contract for student workers incorporated into the Labour Code in 2019. What comes next will be a debate on the reduction of working hours to 40 a week, or making it more flexible in a monthly distribution. This seems insufficient. In times of economic crisis, such as those to come, it will be essential to talk about how to make national law more flexible.

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