LABOR REFORM OF 2017

On Jan. 26, 2017, with the signing into law of Act No. 4, the government implemented the far-reaching Labor Reform of 2017. We have updated this compendium in accordance with that reform and other legal developments of the last two years.

EMPLOYMENT CONTRACT

The employment contract is governed by state and federal labor statutes, as well as the Puerto Rico Civil Code. Article 20(7) of Act No. 379 of May 15, 1948, as amended, P.R. Laws Ann. tit. 29, §288(7), defines the employment contract as any oral or written agreement by which the employee binds himself or herself to execute a work, perform a labor, or render a service for the employer for wages or any other economic remuneration. If there is no express stipulation as to wages, the employer must pay the employee the minimum wage established by law.

The Labor Reform of 2017 included specific provisions regarding the employment contract. Act No. 4 defines it as "a contract by which a legal or natural person, called 'employer,' hires a natural person, called 'employee,' so that the latter renders services freely and voluntarily for the benefit of the employer or a third party in exchange for a compensation for the services rendered, when the services are rendered as an employee and within the scope of the organization and under the direct direction of the employer."

The statute also provides that "the term 'employer,' when used in a contract or in a statute, includes every person that represents the employer or that exercises authority on its behalf, but only for purposes of identifying the person whose decision, act or omission shall be attributable to the employer, unless it is otherwise expressly provided."

Act No. 4 excludes from the definition of "employee," unless specifically provided otherwise in a special statute, the independent contractors, franchise relationships, government employees or public workers, the work of inmates in a correctional facility, and the free and voluntary work for humanitarian, religious or public service institutions. It also excludes the work performed by immediate relatives, unless it is shown that the

intention of the parties and the way in which the relationship was conducted, was the same as any employer-employee relationship. The immediate relatives are those who live with the employer, as well as the employer's spouse, parents and children, including adopted children.

It should be noted that a written contract is not required for an employer-employee relationship to arise. The contract can also be established verbally unless a special law provides otherwise. In those cases in which a termination date is not stipulated in the employment contract, it will be considered that the contract is for an indefinite term and the employee will be protected by Act No. 80 of May 30, 1976, as amended, P.R. Laws Ann. tit. 29, §§185a-185n.

The employment contract can be written in any language if the employee knows that language. Act No. 4 also provides that the signature of the employee in the employment contract establishes a presumption that the employee had knowledge of the language used and the content of the contract.

In the contract of employment, the parties may include the covenants, clauses and conditions that they consider convenient, provided that the same are not contrary to the "laws, morals or public order." The obligations arising from an employment contract shall have the force of law between the contracting parties and must be fulfilled in accordance with it.

In case any clause of the employment contract is ambiguous, its interpretation will be based on what was agreed by the parties, the law, the purpose of the relationship, productivity, the nature of the employment relationship, good faith, customs and generally observed customs of trade. This will also apply to interpret the policies or rules that the employer establishes. However, if the employer reserves the discretion to interpret its policies or rules, this reservation must be recognized, provided that the interpretation is not arbitrary or capricious or that a special law provides otherwise. In view of the above, it is recommended that all employee manuals include a proviso that the employer reserves the discretion to interpret its policies and rules.

In Puerto Rico, employee handbooks describing the rights and responsibilities of employees are construed to be part of the employment contract. Therefore, both the employer and the employee have the legal duty to comply with the provisions contained therein, unless the employer modifies them prospectively.

EMPLOYEES FROM ANOTHER JURISDICTION

If an employer of another jurisdiction assigns an employee to work in Puerto Rico for the benefit of another employer, but the employee maintains his or her employment relationship with the employer located in the other jurisdiction and the assignment in Puerto Rico does not exceed three (3) consecutive years, contractual and legal rights and obligations shall be construed in accordance with the employment contract, and the employee may be subject to the laws of another jurisdiction. In these

cases, the employee will only be subject to the laws of Puerto Rico with respect to: (i) income tax, (ii) discrimination in employment, and (iii) work-related accidents or conditions. However, if the parties do not include in the contract a "choice of law" clause, then the parties will be subject to the "rules" of Puerto Rico.

DOCUMENTS AND ELECTRONIC SIGNATURES

Act No. 4 provides that in every contract or document of employment, the acknowledgments of receipt, acceptances, or signatures generated electronically, have the same legal effect as those made in writing. It also provides that when a law requires the use of an employment document or written notifications, the use of an electronic version will have the same legal effect. Any notice required by law, that is notified or disclosed electronically, must be made so that it is effectively communicated to the employees.

PROBATIONARY PERIOD

The probationary employment contract is regulated by Article 8 of Act No. 80 of May 30, 1976, as amended, P.R. Laws Ann. tit. 29, §185h. Act No. 4 significantly amended that Article to establish an automatic probationary period of nine (9) months, or twelve (12) months in the case of employees classified as "executives", "administrators" and "professionals" under the *Fair Labor Standards Act* and regulations of the Puerto Rico Department of Labor and Human Resources. Notwithstanding that, the employer and the employee may agree to a probationary period shorter than the automatic statutory period. In that case, it is recommended that the period be agreed upon in writing, establishing the dates on which the period begins and ends. In the case of employees represented by a labor union, the applicable probationary period will be the one agreed between the employer and the union.

If an employee continues to work for the employer after the expiration date of his/her probationary employment contract, the employment relationship becomes one for an indefinite term and the employee will be protected from unjust dismissal under Act No. 80. In any event, employees working under a probationary employment contract are protected by all the other applicable employment laws including, for example, those related to employment discrimination and retaliation.

TEMPORARY EMPLOYMENT

Act No. 4 added Article 14 to Act No. 80 of May 30, 1976, as amended, 29 L.P.R.A. §185n. The new Article includes the definitions of the "temporary employment contract" and the "term employment contract."

The "temporary employment contract" is a written or verbal employment contract based on an employment relationship that is established to perform a specific project, a certain work, to replace an employee during a leave of absence, or to carry out extraordinary or short-term tasks. Examples of such tasks are annual inventories; repair of equipment, machinery or facilities of the company; casual loading and unloading of cargo; work at certain times of the year such as Christmas; temporary increase of production demands; and any other project or particular activity.

On the other hand, the "term employment contract" is a written or verbal employment contract based on an employment relationship that is established for a specific time or a particular project. Although the contract can be renewed, if the practice, circumstances and frequency of the renovations are of such that they tend to indicate the creation of an expectation of indefinite continuity of employment, it will be understood that employment is established without a defined term. Under the amendment of Act No. 4, a term employment contract will now be presumed valid and *bona fide* if it is for a term not exceeding three (3) years in its initial term or in the aggregate of its renewals. In addition, in the cases of "administrators", "executives" and "professionals," as these terms are defined by regulation, this employment relationship will be governed by the will of the parties as stated in the contract.

In the case of employees hired through temporary employment agencies, Act No. 26 of July 22, 1992, P.R. Laws Ann. tit. 29, §§575-575e, defines the corresponding areas of responsibility of each company involved with respect to the rights of the temporary employees.

INDEPENDENT CONTRACTOR

Act No. 4 codified for the first time the requirements to determine whether a person is an "independent contractor." The law establishes that there will be an incontrovertible presumption that a person is an independent contractor, if four basic criteria are met, and at least three of five additional criteria are also met.

The four basic criteria with which the independent contractor must comply are:

(a) Possess or have requested an employer identification number or employer social security number;

(b) Having filed income tax returns as an independent business or as self-employed;

(c) That the relationship between the principal and the contractor has been established through a written contract; and

(d) That the independent contractor has been contractually required to have the licenses or permits required by the government to operate its business, as well as any license or authorization required by law to provide the agreed services.

In addition to the four criteria mentioned above, the independent contractor must comply with at least three of the following five criteria:

(1) Maintain control and discretion over the way in which it will perform the agreed work, except for the exercise of the necessary control by the principal to ensure compliance with any legal or contractual obligation.

(2) Maintain control over when the work will be performed, unless there is an agreement with the principal about the itinerary to complete the agreed work, parameters about the schedules to perform the work, and in the case of training, the time in which the training will take place.

(3) That the independent contractor is not required to work exclusively for the principal unless some law prohibits the contractor from providing services to more than one principal or the exclusivity agreement is for a limited time.

(4) The contractor is free to hire employees to assist in the rendering of the services.

(5) The contractor made an investment in order to provide the services, including, among others: (i) the purchase or rental of tools, equipment or materials; (ii) obtaining a license or permission from the principal to access the principal's place of work to carry out the agreed work; and (iii) rent a space or equipment of the principal to be able to carry out the agreed work.

If the aforementioned requirements are not met, the determination of whether there is an employment relationship or that of an independent contractor will be made based on the "common law test," taking into consideration what the parties agreed in the contract and the degree of direct control of the principal regarding the manner in which the work is to be performed, unless a special law provides otherwise. The criteria of the "common law test" generally includes: the degree of control by the principal, the degree of judgment or initiative of the person, the form of compensation, the faculty of the person to hire and fire, the ownership of equipment and physical facilities, and the withholding of taxes.

Act No. 4 provides that the so-called "economic reality test" will not be used unless a special law expressly requires the use of that or another test for the purposes of the matters covered by that special law. The "economic reality test" generally includes: the opportunity for profit and risk of loss by the person, the dependence of the person on the principal, the permanence of the relationship, and whether the service is an integral part of the business of the principal.

REGULAR WORK SHIFT

Puerto Rico Act No. 379 of May 15, 1948, P.R. Laws Ann. tit. 29 §271 *et seq*., provides that the regular work shift for non-exempt employees is one of eight (8) hours per day, and a regular workweek of forty

(40) hours per week. Any work performed in excess of these limits will be considered overtime work and must be compensated accordingly.

OVERTIME

Puerto Rico Act No. 379 of May 15, 1948, P.R. Laws Ann. tit. 29 §271 *et seq*., along with the Federal Fair Labor Standards Act of 1938 (FLSA) and the corresponding regulations, govern the overtime requirements for non-exempt employees in Puerto Rico. The FLSA applies to every employer with an annual business volume in excess of five hundred thousand dollars ($500,000). It also applies to an employer who does not meet the stated annual volume but whose employees are engaged directly in the interstate commerce or in the production of goods for the interstate commerce.

Under Act No. 379, daily overtime is defined as the hours an employee works for the employer in excess of eight (8) hours during any calendar day. The employer may notify the employee of an alternative cycle of twenty-four (24) hours, provided that the notification is in writing, at least five (5) days prior to the start of the alternative cycle, and there are at least eight (8) hours between consecutive shifts.

On the other hand, weekly overtime are the hours that an employee works for the employer in excess of forty (40) during any week of work. Act No. 379 defines the "work week" as a period of one hundred and sixty-eight (168) consecutive hours. It will begin on the day and time that the employer determines and so the employer will notify the employee in writing. In the absence of notice from the employer, the work week will begin by statutory default at 12:01 a.m. on the Monday of each week. The employer must inform the employee of any change in the beginning of the work week, at least five (5) calendar days prior to the change.

Any employer who employs or permits an employee to work during overtime shall pay for each extra hour a salary not less than a time and a half of the wage rate agreed for regular hours. However, employees entitled to higher benefits hired prior to the effectiveness of Act No. 4, that is, before Jan. 26, 2017, will preserve them. In any case, it will not be necessary to pay at a weekly overtime rate any time that is compensated as daily overtime.

ALTERNATIVE WEEKLY WORK SCHEDULE

The employer and the employee may establish an "Alternative Weekly Work Schedule" by written agreement. Under this agreement, the employee may complete a work week of no more than forty (40) hours, with daily shifts of no more than ten (10) hours.

In these cases, the hours that the employee works per day up to maximum of ten (10) will not constitute overtime. However, if the employee works more than ten (10) hours in a given day, the employee will be entitled to overtime pay at a rate of time and a half.

"Alternative Weekly Work Schedule" agreements may be revoked by mutual agreement of the parties during the first year of the agreement. After the first year, either party may unilaterally terminate the agreement. Also, if a third party acquires the employer's business, it may continue with the agreement without having to execute a new contract.

REQUEST TO MAKE UP FOR HOURS NOT WORKED

The employer may grant the request of an employee to make up for hours not worked for personal reasons. The employee will not be entitled to overtime pay if the employee makes up for said hours the same week of the absence and does not work more than twelve (12) hours in a day or forty (40) hours in the week.

The employer is not obliged to grant the request. Likewise, the employer cannot require the employee to make up for hours not worked, against the employee's will, without then paying the overtime rates that may apply. There are no formal requirements for the processing of this request. However, if the employer allows the employee to work during the period proposed by the employee, it will be understood that the employer granted the petition.

REQUEST FOR CHANGES

An employee may request a change in the work schedule, the number of hours or the place where the employee must carry out the work. The request must be in writing and specify the: (i) requested change, (ii) reason for the request, (iii) effective date, and (iv) duration of the change.

The employer must provide an answer within twenty (20) calendar days from the receipt of the employee's request. Any employer that has more than fifteen (15) employees must provide the answer in writing. If the employer meets with the employee within twenty (20) calendar days after receiving the request, the employer can reply to the request within fourteen (14) calendar days following the meeting. If the employer does not provide an answer within 34 calendar days of receipt of the request, or if it allows the employee to work in accordance with the change requested, it will be understood that the employer granted the employee's request.

In its answer, the employer may grant or deny the employee's request. If the employer agrees to the request, it can establish the conditions or requirements that it deems appropriate. If the employer denies the request, it must state in its answer the reasons for the decision, as well as any alternative to the request presented.

The employer must give priority to requests from heads of family who have parental authority or sole custody of their minor children.

The employees eligible to submit this request are those who regularly work thirty (30) hours or more per week and who have worked for the employer at least one (1) year prior to the date of the request. In addition, no other application may be submitted within the term of six (6) months of receipt of the employer's written answer to a previous request, or the granting of a previous request, whichever is larger.

WEEKLY DAY OF REST

P.R. Act No. 289 of 1946, P.R. Laws Ann. tit. 29 §295, provides non-exempt employees with a day of rest for every six (6) consecutive days of work. The day of rest is a calendar period of twenty-four (24) consecutive hours during a calendar week and needs not to fall on any particular calendar day. Act No. 289 requires payment of work performed by a non-exempt employee on the day of rest at time and a half his/her regular rate of pay, regardless of the total number of hours that the employee worked in the preceding six days. However, employees entitled to higher benefits hired prior to the effectiveness of Act No. 4, that is, before Jan. 26, 2017, will preserve the same. On the other hand, if an hour worked on the seventh day also constitutes weekly overtime, it is sufficient to pay that hour at time and a half the regular rate to comply with both penalties.

MEAL PERIOD

Puerto Rico Act No. 379 of May 15, 1948, P.R. Laws Ann. tit. 29 §283, requires an employer to grant all non-exempt employees a meal period commencing not before the end of the second (2nd) hour of work and not later than before the beginning of the sixth (6th) hour of work. An employee should never be required to work more than five (5) consecutive hours without pausing for a meal period. In those cases, in which the total hours worked by the employee on the day does not exceed six (6) hours, the meal period can be waived.

If an employee is required or permitted to work during his/her meal period, or if the period is enjoyed outside the time frame mentioned above, the employee will be entitled to payment for said period or fraction thereof, at time and a half the rate for regular hours. However, employees entitled to payment of a rate higher than time and a half prior to the effectiveness of Act No. 4, that is, before Jan. 26, 2017, will preserve that right. This penalty is independent of overtime requirements.

A meal period must be for one (1) hour unless the employer and the employee mutually agree to reduce it. A reduction of the meal period must be for the mutual benefit of the employer and the employee and said reduction must be stipulated in writing. A reduced meal period cannot be for less than thirty (30) minutes, except in the cases of nurses, security guards, croupiers, and others authorized by the Secretary of Labor and Human Resources, where it may be reduced to twenty (20) minutes.

An employer may not employ an employee for more than ten (10) hours per day without providing the employee a second meal period unless the total hours worked that day do not exceed twelve (12) hours. This second meal period can also be reduced. If the

total hours worked do not exceed twelve (12) hours, the second meal period may be waived if the employee enjoyed the first meal period.

CLOSING LAW

Act No. 4 repealed the" Act to Regulate the Operations of Commercial Establishments," as amended, commonly known as the Closing Law. The repealed statute regulated the opening of certain commercial establishments dedicated to retail sales. However, those commercial establishments that were required under the Closing Law to remain closed during Good Friday and Easter Sunday, shall remain closed on those dates.

ANNUAL (CHRISTMAS) BONUS

Act No. 148 of June 30, 1969, as amended, P.R. Laws Ann. tit. 29 §501 *et seq.*, also known as the Christmas Bonus Act, provides that every employer will be required to pay an annual bonus to each employee that worked seven hundred (700) hours or more during the period of twelve (12) months comprised between Oct. 1 of the preceding year and Sept. 30 of the current year.

Those employers that employ more than fifteen (15) employees, will have to pay to the qualifying employees a bonus equivalent to a 6% of the salary of each employee up to a maximum of $10,000 (i.e., up to $600 of bonus). Those employers that employ up to fifteen (15) employees will pay, instead, a bonus equivalent to a 3% of the salary of each employee also up to a maximum of $10,000 (i.e., up to $300 of bonus).

Notwithstanding the foregoing, for employees hired as of Jan. 26, 2017, the statutory bonus will be different. Any employer who employs more than twenty (20) employees within the twelve (12)-month period from Oct. 1 of any year to Sept. 30 of the following calendar year, shall pay to each employee who worked at least one thousand three hundred and fifty (1,350) hours during said period, a bonus of two percent (2%) of the total salary earned, up to the amount of six hundred dollars ($ 600.00). Employers, who employ twenty (20) or fewer employees during said period, shall pay each employee who worked at least one thousand three hundred and fifty (1,350) hours during the period, a bonus of two percent (2%) of the total salary earned, up to a maximum of three hundred dollars ($300.00). Furthermore, for those employees hired as of Jan. 26, 2017, the statutory bonus will be fifty percent (50%) of what is provided herein, during the first year of their employment.

The bonus must normally be paid between Nov. 15 and Dec. 15 of each year, subject to a penalty if paid late. The employer may credit to said bond any other bonus that it had previously paid to the employee during the year for any reason, provided that the employer notified the employee in writing of its intention to credit said payment to the bonus required by Law.

The total of the amounts to be paid by reason of said bonus should not exceed 15% of the net annual profit of the employer for the period from Sept. 30 of the previous year to Sept. 30 of the year in which the bonus must be paid. Should the total exceed that percentage, and the employer be interested in an exemption from the payment of the bonus that year, it must submit to the Secretary of Labor and Human Resources a general balance sheet and a profit and loss statement, duly certified by a certified public accountant, for the 12-month period comprised from Oct. 1 of the preceding year to Sept. 30 of the current year. This statement must be submitted by no later than Nov. 30 of the year to which the bonus corresponds. If the financial year of the employer requesting the exemption does not end on Sept. 30 of each year, the balance sheet and profit and loss statement required may be that corresponding to the financial year of the business. The Department of Labor and Human Resources has the authority to conduct an investigation on the financial situation of the employer that requests the exemption.

MINIMUM WAGE

The Fair Labor Standards Act, 29 U.S.C.A. 201 *et seq.* (FLSA) currently establishes a minimum wage for non-exempt employees of $7.25 per hour. Locally, Act No.180 of July 27, 1998, provides that every

employer who is not covered by the FLSA must pay to non-exempt employees a minimum wage of at least 70% of the applicable federal minimum wage.

On Feb. 12, 2014, the President of the United States signed Executive Order 13658 which provided for an increase in the minimum wage to the employees of federal contractors to $10.10 per hour, for contracts that begin as of Jan. 1, 2015. Also, for contracts that begin as of Jan. 1, 2016, the minimum wage of said employees shall be determined annually by the U.S. Secretary of Labor, based on the parameters set forth in the Executive Order. As of Jan. 1, 2018, the minimum wage of these employees is $10.35 per hour.

Under the recent federal law known as PROMESA, the Governor of Puerto Rico, subject to the approval of the Financial Oversight and Management Board established by the statute, set a subminimum wage of $4.25 an hour for employees who are initially employed after the date of enactment of the Act and have not attained the age of 25.

PAYMENT OF WAGES

Act No. 17 of April 17, 1931, as amended ("Act No. 17"), P.R. Laws Ann. tit. 29 §§ 171 *et seq.*, establishes the requirements for the payment of wages to non-exempt employees.

The payment of wages may be executed on a weekly basis, on a biweekly basis, or every fifteen (15) days. If the employment ends during any given pay period, the employer is obligated to make the payment for the total number of hours worked by not later than the next official pay day.

Pursuant to Act No. 17, the employer can make the payment of wages by check without the consent of the employees and without having to give them time off with pay to cash their checks. Wages can also be paid by electronic transfer of funds or by direct deposit in a bank account, including payments to a "payroll card" as defined by the statute, but only with the consent of the employees involved. The employer shall bear the cost of the electronic transfer or direct deposit, if any, and shall submit to the employee a receipt of the funds paid or deposited. The employee has the option of having the voucher delivered through electronic means.

If a check paid by the employer to an employee is returned for insufficient funds or because the employer has closed the bank account, the employee is entitled to an additional one hundred percent (100%) amount as a penalty. In addition, if the employer does not reimburse the employee for the amount of the check within ten (10) days after the official pay day, the employer will also commit a criminal offense which can carry up to five days in prison for each dollar not paid. The issuance of each

check constitutes a separate criminal offense. If a check is returned for insufficient funds or because the employer has closed the bank account, the employees may file a complaint with the Secretary of Labor requesting that the employer be required to post a bond approved by the Commissioner of Insurance to guarantee the payment of wages to the employees.

If an employee selects the electronic transfer or direct deposit methods, the employer is required to provide the employee with information regarding electronic fraud, and the degree of responsibility of the employee, the employer as well as the bank in such cases. Further, employers are also required to deliver to each employee a voucher as evidence of the salary deposited or transferred.

Employees in the categories of Executives, Administrators and Professionals, as those terms are defined by Regulation No. 13 of the Minimum Wage Board of Puerto Rico, are excluded from coverage.

SALARY DEDUCTIONS

Act No. 17 of April 17, 1931, as amended, P.R. Laws Ann. tit. 29 § 175 *et seq.*, prohibits deductions from non-exempt employees' salaries, unless they are covered by one or more of the following exceptions summarized below or are otherwise authorized by law:

- For payment of dues of the employee to a non-profit association authorized to render medical-hospital services in Puerto Rico.
- For the purchase of Savings Bonds issued by the Government of Puerto Rico or the United States Government.
- For payments to a properly organized credit union operating either under the laws of Puerto Rico or the Federal Credit Union Act of 1934, as amended.
- For check-off of union dues stipulated in a collective bargaining agreement.
- As the employee's contribution or payment towards any type of plan not covered by ERISA, such as pension, saving, or retirement plan, or an annuity life, life, accident, or health insurance plan or any combination of these plans, if the total employee contribution to any combination of these plans does not exceed the total Company contribution and prior authorization for the deduction has been obtained from the Secretary of Labor of Puerto Rico unless the deduction is stipulated in a collective bargaining agreement covering the employees of the employer. Obtaining such approval is normally a routine, but a time-consuming procedure.
- To cover salary advances from the wages which cannot exceed the salary for the week in which the advance was made; however, no amount can be retained from an employee's wages in excess of the total amount that was advanced.

- For voluntary contributions to charitable institutions or to community schools of the Puerto Rico Department of Education or both, provided that such deductions may not exceed three percent (3%) of the employee's annual salary deducted proportionately every month, and subject to other conditions and restrictions included in the statute.
- For contributions to individual retirement accounts, or, in the case of public employees, the Pension Administration System ("Sistema de Retiro").
- For contributions to benefit plans covered by ERISA.
- For a tax debt payment plan, authorized in writing by the employee, and authorized and certified by Puerto Rico's Treasury Secretary.
- For contributions or donations made by the employee to fund-raising campaigns of the University of Puerto Rico, provided the employer makes the corresponding payments and send them directly to the University of Puerto Rico.
- For buying stocks issued by the corporation or company for which the employee works, provided the employer complies with certain requirements established by the statute and that the written authorization of the employee to that effect comply with the specific language requirements for such purpose set forth in the same.

All the above deductions, except the one for salary advances, must be previously authorized in writing by the employee before the deduction is made. Other deductions that are required or authorized by law include those for normal payroll taxes (income taxes, Social Security and Medicare), child support, or for garnishment of wages, among others.

Failure to comply with this statute could lead to significant liability to the employer such as the employee claiming reimbursement of the amounts illegally deducted.

GARNISHMENT OF WAGES

Article 249, section 7, of the Code of Civil Judgment of 1904, as amended on multiple occasions, P.R. Laws Ann. tit. 32 §1130(7), establishes an exemption for the garnishment of wages in the execution of civil judgments. Except for garnishments to collect taxes, child support payments, and payments due to bankruptcy trustees under Puerto Rico and Federal law, only one-fourth (25%) of any unpaid earned income may be garnished pursuant to a Court order.

A worker's unpaid earned income in possession of the government of Puerto Rico, its municipalities, agencies, or public corporations may not be garnished except as otherwise provided by special legislation such as Puerto Rico's Child Support Act (Act No. 5 of Dec. 30, 1986, as amended, P.R. Laws Ann. tit. 8 §§ 501 *et seq*.). This legislation also adopted the maximum garnishment limits set in Section

303(b) of the Federal Consumer Credit Protection Act, 15 USCA § 1673(b), which vary from fifty to sixty-five percent (50%-65%) depending on the particular facts of each case.

CHILD SUPPORT ADMINISTRATION

Act No. 5 of Dec. 30, 1998, as amended, 8 L.P.R.A. §§ 501, *et seq.*, created the Child Support Administration (ASUME, by its acronym in Spanish). ASUME is an agency established under Title IV-D of the Federal Social Security Act that oversees enforcement of child support obligations and the Commonwealth of Puerto Rico's public policy regarding child support and the Support of the Elderly Program (PROSPERA, by its acronym in Spanish). Among the services that ASUME provides are: locating fathers and mothers whose whereabouts are unknown and whose attendance is necessary to conduct the child support proceedings; establish paternity and child support; and establish, modify and revise child support garnishment orders, among others.

The Court or ASUME may require the employers to withhold or deduct from the employee's income the amount indicated in the child support garnishment order to satisfy the payment of support and of any debt for due and unpaid support. The employers shall begin the withholding no later than seven (7) business days from the first date that the amount should have been paid or credited to the employee after receiving the notice of the Court or ASUME. Subsequently, the employers shall remit to ASUME the amount withheld for each pay period within seven business (7) days from the date in which the payment is made to the employee. The amount to be withheld from the employee's salary or wages for the payment of the current child support payment of each month, for the payment in arrears, if any, and to defray the cost of the withholding order by the employer, shall not exceed the limits established by section 303(b) of the Consumer Credit Protection Act, 15 USCA § 1673(b), which vary from fifty to sixty-five percent (50%-65%) depending on the particular facts of each case.

The employers shall comply with the child support garnishment orders in child support cases. Said orders shall be effective at the time of their notification and shall continue in effect if the duty to provide support exists, or until said order is rendered ineffective, suspended, modified, or revoked by the Court or ASUME. If an employer fails to withhold or remit the income withheld pursuant to a withholding order or fails to comply with any of the duties imposed by ASUME, at the request of the creditor, the Court or ASUME, after due notice to the employer and notice for the holding of a hearing, shall enter judgment for the total amount the employer failed to withhold and remit, plus fines, expenses and interest that may be imposed, and shall order the collection of the same on the property of the employer.

If an employee terminates his/her employment, the employers shall notify the Court or ASUME the employee's last known address, and the name, address of the new employer, if known, within thirty (30) days following the date of the employee's termination. The employer must also procure an account

statement certificate from ASUME and withhold from the employee's liquidation any outstanding amounts for child support or repayment plan in excess of a month.

STATE REGISTER OF NEW EMPLOYEES

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA") was enacted to require the states that receive federal funds to administer their child support programs to adopt and amend their local statutes to conform the same to the Uniform Interstate Family Support Act (UIFSA). Puerto Rico enacted the Uniform Interstate Family Support Act (LIUA, by its acronym in Spanish), Act No. 80 of Dec. 20, 1997, as amended, P.R. Laws Ann. tit. 8 §§ 541, *et seq.* This law granted the Child Support Administration (ASUME, by its acronym in Spanish) the necessary duties and powers to establish a State Register of New Employees (RENE, by its acronym in Spanish), as required by the PRWORA.

The RENE contains current information about the new employees that are employed or re-employed in a public or private establishment. Its purpose is to assist the ASUME in locating the persons that have abandoned their children or that do not comply with their child support duties.

The employers that employ or re-employ a person on a full, part-time, or temporary basis, shall furnish the following information to ASUME: the name, address, and social security number of the employee; and the name, address, and federal employment identification number, or if a federal employment identification number is not required, the employer identification number of the Government of Puerto Rico. The employers must provide this information regarding every person that they employ, regardless of whether the employee has child support obligations or not.

The employers shall notify by mail or by any electronic means the information required in the RENE in the W-4 form furnished by the U.S. Internal Revenue Service, or in the W-5 form furnished by the ASUME. Effective March 2009, the employers may report their new employees through the Commonwealth of Puerto Rico Department of Labor and Human Resources' website at www.trabajo.pr.gov. The employers may also print the corresponding form and review their employees hiring history using said website.

EMPLOYMENT OF MINORS

Act No. 230 of May 12, 1942, P.R. Laws Ann. tit. 29 §§431 *et seq.*, establishes the requirements and obligations that employers must follow to employ minors. The law specifies various occupations in which a minor may not be employed. Also, every employer must have a special permit or an

employment certification issued by the Puerto Rico Department of Labor and Human Resources for every minor it employs between the ages of fourteen (14) and eighteen (18) years. Furthermore, the employer must have a list in a visible area of the work area of the minors it has employed, their work schedule, the maximum hours that the minors can work in a day, and the schedule for the meal period.

Act No. 230 establishes, among other things, that: (1) no minor between the ages of 14 and less than 18 years of age can work more than six consecutive days in a week, more than 40 hours in a week, nor more than 8 hours in a day; (2) if a minor works and attends school, the maximum combined hours of work and school attendance will be eight; (3) minors who have 14 years of age but less than 16 years of age can work between 8:00 a.m. and 6:00 p.m.; and (4) minors who have 16 years of age but less than 18 years of age can work between 6:00 a.m. and 10:00 p.m.

On the other hand, every minor between the ages of fourteen (14) and less than eighteen (18) years of age will have the right to a meal period of one (1) hour after they have worked four (4) consecutive hours. If the minor enjoys a meal period of less than one (1) hour, it will be understood that the consecutive work period was not interrupted.

The employer that violates any of the provisions of Act No. 230 will be subject to penalties, which may include fines between $25 and $1,000, and/or imprisonment in jail for a term of not more than ninety (90) days.

MIGRANT WORKERS

The local statute that regulates the hiring of Puerto Rican workers to work outside of Puerto Rico, commonly known as the Migrant Workers' Act, prohibits the recruitment and/or transportation of workers without the corresponding authorization of the Secretary of Labor and Human Resources of Puerto Rico, or the Secretary's authorized representative.

According to the statute, in general terms, those who wish to contract the services of workers will have to formalize a written contract with the persons to be recruited, including certain requirements established by the corresponding regulation.

Any violation of the Act's provisions constitutes a misdemeanor, in addition to being bound to civil responsibility subject to payment of damages.

TERMINATION OF EMPLOYMENT

Act 80 of May 30, 1976, as amended, P.R. Laws Ann. tit. 29 §§185a-185m (Act No. 80), requires that employers have "just cause" to terminate the employment of an employee hired for an indefinite period of time. If it is determined that there is no just cause, the discharged employee is entitled to an indemnification under Act No. 80 known as the "*mesada.*" This payment provides an exclusive remedy for an employee claiming unjust dismissal. An employee can bring such a claim within one year of the effective discharge date, except that employees dismissed prior to Jan. 26, 2017 will have a term of three (3) years to make the claim. This statute, however does not bar an employee from presenting other claims against his/her employer related to a termination, such as claims of discrimination or retaliation.

Act No. 80 provides a formula for computing the amount an employer must pay when an employee is discharged without just case, based on the highest salary earned by the employee in the last three years and the amount of completed years (s)he worked for the employer. An employee discharged without just cause is entitled under Act No. 80 to receive the equivalent of 2 months' salary plus 1 week of pay for each full year of service, if (s)he has worked for the employer up to 5 years. If the employee has worked more than 5 and up to 15 years, (s)he is entitled to receive 3 months of salary plus 2 weeks of pay for each year of service. Employees who have worked for their employer for more than 15 years are entitled to receive 6 months of salary plus 3 weeks of pay for every year of service.

Notwithstanding the above, an employee hired as of Jan. 26, 2017 and who is dismissed without just cause, is entitled to a severance pay that consists of: twelve (12) weeks of salary (the Law states "three (3) months," but defines a "month " as four (4) weeks for purposes of this calculation), and an additional amount equal to two (2) weeks of salary for each full year of service. The total compensation is subject to a cap of nine "months," that is, thirty-six (36) weeks.

The payment of the compensation provided by this Act, as well as any voluntary payment up to the statutory severance, paid because of the employee's dismissal, will not be subject to Puerto Rico income tax, regardless of whether said payment was made at the time of the dismissal or subsequently, or was made pursuant to a settlement agreement or in compliance with a judgment or administrative order. Any amount paid in excess of the compensation provided in this Act will be subject to Puerto Rico income tax. The payment of the indemnity provided by this Act, as well as any voluntary payment, will be subject to a withholding for social security and Medicare taxes (FICA).

If a judgment or administrative order is issued against the employer instructing the payment of the compensation provided by this Act, any payment previously made by the employer to the employee due to a dismissal shall be credited to the compensation provided by this Act. This credit shall apply

regardless of whether the payment for termination of employment was made pursuant to a contract between the parties, or a policy, plan, or practice of the employer.

For purposes of the calculation of the severance pay or "mesada," the years of service will be determined based on all the periods that the employee worked for the same employer before being dismissed. However, the previous periods will not be taken into account if the employment relationship was interrupted for more than two (2) years. In addition, only those years of service that were rendered in Puerto Rico will be included. Also excluded are those years of service that by reason of dismissal, separation, termination of employment or transfer of an ongoing business, had already been compensated to the employee, whether voluntarily, or pursuant to a judgment, or extrajudicial settlement agreement.

The provisions of this Act shall not apply to those individuals who, at the time of the termination, are rendering services to an employer under a "temporary employment contract" or a "term employment contract." They also do not apply to independent contractors, government employees, and employees covered by a collective bargaining agreement.

Although Act No. 80 does not provide a definition nor a conclusive list of what constitutes just cause for dismissal, it does specify that just cause exists when the following occurs:

- The employee engages in a pattern of improper or disorderly conduct.
- The employee incurs a performance pattern that is deficient, inefficient, unsatisfactory, poor, tardy, or negligent. This includes not complying with norms and standards of quality and safety of the employer, low productivity, lack of competence, or ability to perform the work at reasonable levels required by the employer, and repeated complaints of the employer's clients.
- The employee repeatedly violates reasonable rules and regulations set forth by the employer of which (s)he has timely received a written copy.
- The full, temporary, or partial closing of operations. If the employer owns more than one office, factory, branch or plant, the total, temporary, or partial closure of the operations of any of these establishments where the dismissed employee works, shall constitute just cause for the dismissal.
- Technological or reorganizational changes occur, as well as changes of style, design or nature of the product made or handled by the employer and/or the services it renders to the public.
- Reductions in force that are necessary due to a reduction in the volume of production, sales, or profits, anticipated or present at the time of the discharge, or with the purpose of increasing the competitiveness or productivity of the establishment.

Act No. 80 also clearly states that any capricious discharge unrelated to maintaining proper and normal business operations is not considered with just cause. By the same token, this law establishes that firing an employee for collaborating or making statements related to his/her employer's business before any administrative, judicial, or legislative forum in Puerto Rico does not constitute a discharge with just cause, provided that such statements are not defamatory in nature, nor result in the disclosure of any privileged information. In the latter case, the employee would be entitled to reinstatement with back pay.

Act No. 80 contains other important requirements for how employers can undertake terminations in the specific context of closings, reductions in force, or reorganizations or technological changes. In these cases, the employer must retain the most senior employees, if there are vacancies or positions occupied by employees with less seniority in the former's job classification that may be performed by them. However, at the time of the dismissal, when there is a reasonably clear or evident difference in favor of the capacity, productivity, performance, competence, efficiency, or conduct history of the employees when compared, the employer may engage in a selection process based on said criteria.

If within 6 months of such a termination the employer has an opening for a position requiring the same job functions previously performed by an employee who was terminated, it shall follow the same norms mentioned in the previous paragraph.

Act No. 80 includes in its definition of "dismissal" the resignation of an employee motivated by actions of the employer aimed at inducing or forcing the employee to resign, such as imposing or trying to impose more onerous work conditions, reducing the salary, demoting the employee or subjecting the employee to harassment or humiliations by way of actions or words. However, such acts constitute a dismissal only when the only reasonable alternative left to the employee is to leave the employment. It is not enough that the employee is submitted to any discomfort or unpleasant condition in the employment; the employee must actually be submitted to arbitrary, unreasonable and capricious actions by the employer, that create a hostile atmosphere for the employee that completely prevents the employee from remaining employed, and that are caused by a reason other than the employer's legitimate interest in the well-being of the company. The employee must demonstrate concrete facts. When it comes to humiliations, these must be of substantial magnitude.

Finally, once the dismissal or notification of the intention to dismiss has occurred, the right to the compensation provided by this Act may be settled, provided that all the requirements of a valid settlement agreement are present.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT OF 1988

The Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C.A. §§2101 *et seq.* (WARN), establishes that, with certain exceptions, an employer with one hundred (100) or more employees, excluding part-time employees, or with one hundred or more employees who in the aggregate work at least four thousand (4,000) hours per week, must provide a written notice at least sixty (60) days in advance of a plant closing or mass layoff to affected workers or their representatives. The notice must also be submitted to the Council of Occupational Development and Resources, and the Mayor of the Municipality where the plant is located. It must also be given to the labor union, if any.

WARN defines a plant closing as ". . . the permanent or temporary shutdown of a single site of employment, or one (1) or more facilities or operating units within a single site of employment, if the shutdown results in employment loss at the single site of employment, during any 30-day period for fifty (50) or more employees excluding any part-time employees."

Further, a "mass layoff" under the Act is defined as a reduction in force which: (a) is not the result of a plant closing; and (b) results in an employment loss at the single site of employment during any 30-day period for at least five hundred (500) employees (excluding part-time employees); or at least fifty (50) employees (excluding part-time employees), provided that at least thirty-three (33) percent of an employment site's full-time employees are affected.

WARN defines the term "part-time employees" as: (1) an employee who is employed for an average of fewer than twenty (20) hours per week; or (2) an employee who has been employed for fewer than six (6) of the twelve (12) months preceding the date on which notice is required.

Although the full 60-day notice requirement under WARN is mandatory, there are various exceptions to this rule, since there are particular circumstances in which providing advance notice is not possible, or desirable. As such, there are three (3) situations under WARN in which an employer can give less than sixty (60) days advance notice. Notwithstanding, notice must be provided as soon as practicable even when these exceptions apply and must explain why a reduced notice is being given. The exceptions are as follows:

- Faltering company: A company can provide less than sixty (60) days' notice where, among other things:
    - It was seeking additional capital or business which the employer lacked at the time sixty (60) days' notice of the closing would have been required.
    - The capital or business, if obtained, would have enabled the employer to avoid or postpone shutdown.
    - The employer reasonably and in good faith believed that giving notice would have prevented the employer from obtaining the needed capital or business.

- Unforeseeable business circumstances: When the plant closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the 60-day notice would have been required.
- Natural disaster: Occurs when the plant closing or mass layoff is the direct result of a natural disaster, such as flood, earthquake, storm, or drought.

There are no requirements under Puerto Rico laws with respect to notification of plant closing or mass layoffs.

UNEMPLOYMENT COMPENSATION

The Puerto Rico Employment Security Act, Act No. 74 of June 21, 1956, as amended, P.R. Laws Ann. tit. 29 §§701 *et seq.*, provides for unemployment benefits compensation. It requires the payment by the employer of a payroll tax, including wages paid for services rendered outside of Puerto Rico, but within the U.S., Virgin Islands and Canada, if: (1) the employees are not covered by the unemployment compensation statute of any other State, the Virgin Islands or Canada, and (2) the services are controlled or directed from Puerto Rico.

Employers in Puerto Rico must obtain coverage on the effective date of the commencement of operations. For such purpose, they must file the Form PR-SD-1 (Report to Determine Employer Status) with the Employment Security Bureau of the Puerto Rico Department of Labor.

There is experience rating for unemployment compensation in Puerto Rico. Unemployment compensation rates for employers in Puerto Rico vary between 1.7% and 5.4%, depending on the Company's experience rate. New companies in Puerto Rico will begin paying unemployment compensation at a rate of 3.30% plus an additional 1% for a special unemployment benefits fund. The Secretary of Labor and Human Resources has the authority to increase these contributions. Only eligible employees are entitled to unemployment benefits.

COBRA

The federal statute known as the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) affords to employees, their spouses and dependent children ("qualified beneficiaries"), participating in their employers' health plans, the right to continue coverage thereunder when certain events occur which cause the loss of their coverage.

Generally, COBRA applies to all private sector group health plans if the employer employs at least twenty (20) employees during the previous calendar year.

The continuation of coverage can last up to eighteen (18) months when the employee's termination of employment or reduction of hours occurs, or up to thirty-six (36) months when the employee's divorce or death occurs, or when a child loses his/her dependent status under the plan. The eighteen (18) months continuation of coverage may be extended for up to eleven (11) months if one of the qualified beneficiaries becomes disabled.

Health plans can require qualified beneficiaries to pay one hundred percent (100%) of the cost of COBRA coverage plus up to a two percent (2%) of said cost for administrative fees, or up to fifty percent (50%) during the eleven (11) months disability extension.

COBRA requires that employers provide certain notifications to employees and their families enrolled in the health plan. Among these, is the Initial COBRA Notice which must be provided to the employee and his/her spouse within the first ninety (90) days of coverage. When the employee, his/her spouse, and/or dependent children lose coverage, the employer also has to provide to them a Qualifying Event Notice, along with an Election Form.

HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) limits the ability of an employer health plan to exclude coverage for the preexisting conditions of their new employees and dependent families.

In addition, HIPAA provides additional opportunities to enroll in a group health plan if an individual loses other coverage or experiences certain life events. Employees and dependents that decline coverage due to other health coverage and then lose eligibility or lose employer contributions have special enrollment rights. Also, employees,

spouses, and new dependents are permitted to special enrollment because of marriage, birth, adoption, or placement for adoption. The employee must request enrollment within thirty (30) days of the loss of coverage or life event triggering the special enrollment. The plan must allow enrollment without requiring that the individual wait until the next annual enrollment period.

The statute also prohibits health plans from discriminating against employees and their dependent family members based on any health factors they may have, including prior medical conditions, previous claims experience, and genetic information.

EMPLOYMENT DISCRIMINATION

Puerto Rico Act No. 100 of June 30, 1959, as amended, P.R. Laws Ann. tit. 29 §§146 et *seq*. ("Act 100"), prohibits discrimination in the workplace by reason of age, race, color, sex, national origin, social origin, or condition, military or veteran status, sexual orientation, gender identity, political, or religious ideas, marriage, or for being a victim or perceived victim of domestic violence, sexual aggression or stalking. Act No. 100 prohibits employers from taking adverse employment actions, such as the denial of employment opportunities or promotion, suspension, dismissal, or affecting compensation or other terms and conditions of employment, when the reason for so doing is because the individual belongs to one of the categories or groups protected by the statute. Act No. 100, as amended, also requires employers to provide reasonable accommodation to employees who are victims of domestic violence, stalking and/or sexual aggression.

Act No. 4 repealed the rebuttable presumption of discrimination against the employer, when it dismissed an employee who belonged to one of the protected categories without a just cause.

Puerto Rico Act No. 44 of July 2, 1985, P.R. Laws Ann. tit. 1 §§501 *et seq.* (Act No. 44), which is very similar to the Americans with Disabilities Act of 1990 (ADA), is a special statute that prohibits discrimination against persons with disabilities who can perform the essential duties of their position, with or without reasonable accommodation. The ADA is further discussed in the next section. Also, Act No. 107 of Sept. 9, 2013, prohibits discrimination based on the employees' genetic information.

Other special statutes that are aimed at eradicating workplace sex discrimination in Puerto Rico are the Working Mothers Act, Puerto Rico Act No. 3 of March 13, 1942, P.R. Laws Ann. tit. 29 §§467-474, (Act No. 3), which prohibits the dismissal, suspension, reduction in salary, or any type of discrimination against working mothers, and expressly prohibits the dismissal of a pregnant employee because of her diminished productivity or quality during pregnancy. Similarly, Puerto Rico Act No. 69 of July 6, 1985, P.R. Laws Ann. tit. 29 §§1321-1341 (Act No. 69) provides several prohibitions aimed at discouraging and penalizing sex discrimination in the workplace. On the other hand, the Equal Pay Act of Puerto Rico, Act No. 16 of March 8, 2017, requires equal pay for equal work and imposes certain affirmative actions on employers. Finally, there is a special statute regarding sexual harassment which is discussed in a section under that heading.

Discrimination in the workplace is also prohibited by the Title VII of the federal Civil Rights Act of 1964, 42 USC §§ 2000e *et seq.* (Title VII). This statute prohibits employment discrimination because of sex, race, color, national, or religion. Furthermore, on July 21, 2014, the President of the United States issued an Executive Order that added the categories of sexual orientation and gender identity to the list of those protected from discrimination in the employment. This prohibition, however, only applies to the federal government, and the covered contractors and sub-contractors that enter into a contract of at least $10,000 as of July 21, 2014.

Sex discrimination is further prohibited by the Equal Pay Act of 1993, 29 U.S.C. §206 (d), which establishes that every employee, regardless of his or her gender, who performs equal work, must receive equal pay. The Equal Pay Act expressly prohibits any difference in salary that is gender-based.

The Age Discrimination in Employment Act, 29 U.S.C.§§621 *et seq.* (ADEA), is another federal statute that prohibits employment discrimination because of age. It protects any employee of forty (40) years of age or more, who has been dismissed, subjected to adverse employment actions or otherwise discriminated based on age.

The Antidiscrimination Unit of the Department of Labor and Human Resources (the ADU) is charged with the administration of Act No. 100 and handles discrimination charges under local law. The ADU also investigates discrimination charges under Title VII, ADA and ADEA (except retaliation claims), pursuant to an agreement with the Equal Employment Opportunity Commission (EEOC). In turn, the EEOC handles discrimination charges under the federal statutes mentioned above, namely, Title VII, ADA and ADEA.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 (ADA), 29 U.S.C. §§ 706, *et.seq.*, applies to all employers in the interstate commerce who employ 15 or more employees. The ADA prohibits discrimination in the workplace against qualified individuals with a disability and it requires the employer to provide reasonable accommodations in employment to qualified individuals with disabilities who are qualified to perform the essential duties of their job, with or without reasonable accommodation. The employer's failure to provide reasonable accommodation is also considered a form of discrimination under the ADA.

The ADA defines an individual with a disability as one who suffers a physical and/or mental condition that substantially limits his or her ability to perform at least one of his major life activities, when compared to the average individual. It is also defined as an individual who has a record of a disability; or an individual who is considered by his employer as an individual with a disability, although he/she is not necessarily disabled, so that employers' adverse actions that are based on stereotypes or unfounded ideas regarding disabled persons is also prohibited.

The ADA and its regulations impose upon both the employer and the employee the duty to engage in an interactive process to define the reasonable accommodations that are necessary. In each case, the reasonable accommodation to be provided will depend on the limitations that the disabling condition causes to the employee in his/her performance of the essential job functions, and the nature of the employer's business and its operations. An ADA-covered employer is not required to provide a reasonable accommodation to a disabled individual only if it can demonstrate that the accommodation is unduly burdensome or disruptive of company operations; or that the individual poses a direct safety threat to himself and others that cannot be minimized or eliminated with reasonable accommodation.

The ADA also prohibits the discrimination against persons who are associated or related to a disabled individual.

The ADA was amended in 2009 to clarify that the determination of who is a disabled individual must be liberal, to extend the protections against discrimination and the right to reasonable accommodation in employment to an increased number of individuals that suffer physical and/or mental conditions. These amendments also establish that, as of Jan. 1, 2010, it will not be relevant if an individual mitigates or uses corrective measures (with the exception of eyeglasses) to ameliorate his or her impairment, such as prosthesis, medications, surgery; or whether these measures allow or not the individual to perform his or her major life activities adequately. The determination of who is a disabled individual under the ADA will be made without regard to his or her mitigated state or corrected ailment or remission status. Neither will it be required to analyze the extent, duration or level of severity of an individual's impairment nor its effects on his or her ability to engage in major life activities. Wherefore, as of Jan. 1, 2010, the U.S. Supreme Court opinions that had ruled to the contrary, by applying criteria of restrictive interpretation regarding who is a disabled individual under ADA have been superseded.

RIGHT TO PARTICIPATE IN RELIGIOUS SERVICE

Under Act No. 4 of 2017 (Labor Reform of 2017), if an employee or potential employee notifies the employer, in writing, of the need for religious accommodation, the employer has the obligation to reasonably accommodate the religious practices of the individual. The denial of any reasonable accommodation would only be justified when an employer can demonstrate that the accommodation chosen by the employee, out of those accommodations available, would result in undue hardship. The mere presumption that many other employees with the same religious practices may also need reasonable accommodation is not evidence of undue hardship.

"Religious practice" means any practice that an individual performs or intends to perform, which constitutes an exercise of the individual's creed, religion, or preferred practice.

The employee must submit the request in writing, and it must at least include a description of the religious activity, the frequency and the requested accommodation. The employer must offer a written response within seven (7) business days, or else it will be presumed that the employer granted the request. The employer may arrange a meeting with the employee or job candidate to discuss available accommodations. If the employer denies the request, it must specify the reasons for the denial in its written response.

RETALIATION

Puerto Rico Act No. 115 of Dec. 20, 1990, P.R. Laws Ann. tit. 29 §§194-194b (Act No. 115), prohibits employers from retaliating against an employee by reason of said employee's participation in an activity protected by the statute.

Under Act No. 115, an employer may not dismiss, threaten, or discriminate against an employee with respect to the terms and conditions of his or her employment because the employee offered or attempted to offer, verbally or in writing, any testimony, statement, or information concerning the employer's business, before any legislative, administrative, or judicial forum in Puerto Rico, or in the internal procedures established by the employer, or made to any employee or company representative in a position of authority, as long as the employee's statements are not defamatory nor constitute disclosure of privileged information. By way of an example, it has been held that the filing of a workers' compensation claim for benefits amounts to protected conduct under Act No. 115. An employer who dismisses or in any other way affects an employee's terms and conditions of employment because of the employee's expressions and/or participation before the aforementioned forums, will be responsible for the damages suffered by the employee, reinstatement, and double damages.

Likewise, Act No. 80 of May 30, 1976, P.R. Laws Ann. tit. 29 §§185a-185m, Puerto Rico's general statute against unjust dismissal, prohibits the dismissal of an employee because of his or her participation or statements made concerning his or her employer's business, in an investigation before any administrative, judicial, or legislative forum in Puerto Rico, provided said statements are not defamatory and do not constitute disclosure of privileged information. P.R. Laws Ann. tit. 29 §185b.

Puerto Rico Act 69 of July 6, 1985, P.R. Laws Ann. tit. 29 §1340, which prohibits sex- based discrimination, and Puerto Rico Act 17 of April 22, 1988, P.R. Laws Ann. tit. 29

§155, which regulates sexual harassment in the workplace, also protect employees from retaliation for the filing of internal complaints, opposing the employer's discriminatory practices and/or participating as a witness. Puerto Rico Act No. 379 of May 15, 1948, P.R. Laws Ann. tit. 29 §282, which regulates hours of work and overtime pay, contains an anti-retaliation provision that protects employees who refuse

to accept an alternative weekly work schedule or who request a change in the work schedule, the number of hours or the place where the employee must carry out the work.

There are various federal statutes which also prohibit retaliation against employees for testifying or participating in investigations concerning their employer, or for opposing and/or denouncing their employer's illegal or discriminatory practices. These include Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the Fair Labor Standards Act (FLSA), among others.

SEXUAL HARASSMENT

Puerto Rico Act No. 17 of April 22, 1988, P.R. Laws Ann. tit. 29 §§155 *et seq.* (Act No. 17), prohibits sexual harassment at work. Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, or any conduct of a sexual nature when:

(i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Where employment opportunities or benefits have been granted to one employee because of submission to sexual advances, other employees not so favored may have a cause of action for sexual harassment.

Employers may be liable for an act of sexual harassment by a supervisor or agent, by a non-supervisory employee, or by non-employees such as visitors and contractors, directed at its employees in the workplace. Act. No 17 also protects whistleblowers, witnesses, and claimants from retaliation.

Employers have a duty to keep the workplace free from sexual harassment and intimidation and must clearly state to employees and supervisors their policy against sexual harassment. To comply with this obligation, employers must take the measures that are necessary to prevent, discourage, and avoid sexual harassment. Every claim of sexual harassment must be investigated in a timely manner, and the employer must take any corrective measure that may be necessary.

Sexual harassment is also prohibited by Title VII of the Civil Rights Act of 1964.

PROTOCOL TO HANDLE DOMESTIC VIOLENCE IN THE WORKPLACE

Act No. 217 of Sept. 29, 2006, requires employers in Puerto Rico to establish, promulgate, and implement a protocol for the management of domestic violence when a female or male employee is the victim of violence in his/her home or workplace. The protocol must include a statement of the public policy, the legal basis and applicability, the employees' responsibility, and the procedures and uniform measures to be followed in managing the situation of domestic violence, such as, how to conduct the investigation, the reasonable accommodation for the victim of domestic violence, confidentiality measures, and the guidelines to be followed by supervisors and employees.

The Office of the Advocate for Women will offer technical counseling for elaborating and implementing the Protocol. The Puerto Rico Department of Labor and Human Resources will monitor full compliance with the Protocol, both as to the existence of the document as well as the training of the employees.

Act No. 23 of May 29, 2013 extended the protection of "Act 54" to same-sex couples, consensual couples, and immigrants without regard to their migratory status. Act No. 54 of Aug. 15, 1989, deals with the prevention of and intervention with domestic violence. Employers should revise and modify their protocols and policies to comply with Act No. 23.

PROTOCOL REGARDING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

Act No. 22 of May 29, 2013 prohibits discrimination in the employment based on sexual orientation and gender identity. Article 18 of the statute compels the *Oficina de Capacitación y Asesoramiento en Asuntos Laborales y de Administración de Recursos Humanos* ("OCALARH") and the local Department of Labor to draft a protocol for compliance, education, and training related to Act No. 22.

The Protocol covers matters such as the obligation of the employer to publicize the scope of Act No. 22 and related statutes; the confidentiality of the information regarding the employees' sexual orientation and gender identity; the obligation to provide a workplace free from harassment and hostile environment related to the sexual orientation or gender identity of the employees, for which the Protocol includes specific examples of illegal conduct; and the adoption (or adaptation) of an internal procedure to handle claims of discrimination because of sexual orientation or gender identity.

Two aspects of the Protocol are particularly posing challenges in the workplace. The Protocol identifies as evidence of illegal harassment and hostile environment to deny access to restrooms identified by gender, to employees that identify themselves with that gender. Also, the Protocol identifies as evidence of illegal harassment to require a person to dress in a manner that is inconsistent with the

gender with which that person identifies himself or herself or that precludes the person from expressing his/her gender identity.

VACATION AND SICK LEAVE

Statutory requirements regarding the accrual and enjoyment of vacation and sick leave for non-exempt employees and outside salespersons in Puerto Rico are established in Act No. 180 of July 27, 1998 (Act No. 180), P.R. Law Ann. Tit. 29, §250d.

Employees in the categories of Executives, Administrators, and Professionals, as those terms are defined by Regulation No. 13 of the Minimum Wage Board of Puerto Rico, are excluded from Act No. 180.

Accrual of vacation under Act No. 180 is at the rate of one and one quarter (1 1/4) day per month, for a total of fifteen (15) days per year, provided that the employee works at least one hundred and thirty (130) hours during the month in which the accrual takes place. Accrual of sick leave under Act No. 180 is at the rate of one (1) day per month, for a total of twelve (12) days per year, provided that the employee works at least one hundred and thirty (130) hours during the month in which the accrual takes place. The use of vacation and sick time will be considered time actually worked for purposes of accrual of these benefits.

Notwithstanding the above, for employees hired as of Jan. 26, 2017, the minimum monthly accrual for vacation leave will be half (1/2) a day during the first year of service; three fourth (3/4) of a day after the first year of service until completing five (5) years of service; one (1) day after five (5) years of service until the fifteenth (15) year of service; and one and one quarter (1 1/4) of a day after completing fifteen (15) years of service. The minimum monthly accrual for sick leave will be one (1) day for each month. The employee must work at least one hundred thirty hours (130) in a month to be entitled to these accruals.

Vacation and sick leave benefits are to be accrued based on the regular workday during the months in which the benefits were accrued. In the case of employees whose daily work schedules vary, the regular workday will be determined by dividing the total regular hours worked during the month by the total amount of days worked. In the case of employees whose work schedules cannot be determined, the regular workday will be computed based on an eight-hour workday.

Sick leave will be accrued from the start of the employee's probationary period. Vacation benefits are not accrued during the first six (6) months of employment; however, once an employee completes six (6) months of employment, he/she will accrue vacation leave retroactively to the first day of employment.

Vacation time off and sick leave will be used and paid based on a regular workday at the time when the benefit is used or paid. To that effect, the employer may take into consideration a period of no more than two (2) months prior to the use or the payment of the benefit.

Vacation and sick leave pay will be equivalent to at least the regular hourly rate earned by the employee during the month in which said leave was accrued, except in the case of employees whose salary is based on non-discretionary commissions or other incentives. In those instances, the employer may calculate the regular hourly salary by dividing the total commissions or incentives earned during the year by 52 weeks.

An employee is not entitled to enjoy vacation time until it has been accrued for an entire year. Under statutory provisions, vacation time should be granted annually, in such way that it does not interrupt the normal operations of the employer, to which end the employer will establish the vacation schedule. In addition, vacation time should be enjoyed consecutively. However, by mutual agreement between the employer and the employee, vacation leave may be fractioned, as long as the employee enjoys at least five (5) consecutive working days of vacation leave during the year.

In addition, vacation time may be accrued up to two (2) years by mutual agreement between the employer and the employee. To that effect, an employer who fails to provide vacation leave to an employee after he/she has accrued the same in excess of years, must grant the employee vacation leave for the total number of days accrued, and pay the employee twice the amount for the vacation accrued in excess of two (2) years.

Also, at the written request of the employee, an employer may allow that vacation time include those non-working days comprised within the period in which the employee will enjoy his/her vacation, and/or non-working days immediately before or after said vacation period. Likewise, at the written request of the employee, an employer may partially "liquidate" or pay-off the vacation leave accrued by the employee in excess of ten (10) days.

When an employee's employment is terminated for whatever reason, the employer must pay the employee the total vacation leave he/she has accrued, even if it involves less than one (1) years' worth of accrual of the benefit. Regarding this liquidation, please also refer to the discussion under the section titled "ASUME."

With respect to sick leave, except in cases of acts of *force majeure*, employees are required to notify about an illness which prevents them from showing up to work, as soon as it is foreseeable and not later than the same day of his/her absence to work. The enjoyment of sick leave cannot be used as an excuse by the employee for lack of compliance with those rules of conduct validly established by the employer such as, for example, those dealing with attendance, the requirement of providing a medical certificate if the absence exceeds two (2) working days, and the requirement of periodical reports about the continuation of the illness. Sick time which is not taken by the employee during the year will remain accrued for successive years up to a maximum of fifteen (15) days.

In addition, pursuant to Act No. 60 of Jan. 27, 2018, an employer may not use excused sick leave as a criterion for the efficiency of employees in the process of evaluating them if it is considered for increases in salary or promotions in the company. Neither may it consider absences correctly charged to sick leave, to justify disciplinary actions such as suspensions or dismissals.

In case of a violation of Act No. 180 by the employer, the employee will be entitled to the salaries owed by the employer and a statutory double penalty, plus compensatory damages.

SPECIAL LEAVE FOR EMPLOYEES WITH CATASTROPHIC DISEASES

Act No. 28 of Jan. 21, 2018, establishes a Special Leave for employees who suffer one of the Serious Diseases of Catastrophic Character listed by the Special Coverage of the Health Insurance Administration of Puerto Rico and by any other applicable regulation.

Employees who have worked for their employer for at least twelve (12) months will be eligible for this Special Leave with pay of up to a maximum of six (6) working days per year, in addition to those to which the employee is already entitled to by law. The leave may be used through split, flexible or intermittent schedules. Before requesting the leave, the employee must exhaust his/her sick leave.

The use of this leave may not be used for unfavorable evaluations of the employee or to take adverse actions against him or her, such as, but not limited to, reductions in working hours, reclassification of positions or changes in shifts. In addition, the use of this leave will be considered time worked for purposes of the accrual of all benefits as an employee.

The employer may require the employee to provide a medical certificate from the health professional offering the medical treatment, certifying that the employee is diagnosed with any of the Serious

Diseases of Catastrophic Character and that the employee continues to receive medical treatment for said illness.

MATERNITY LEAVE

Act No. 3 of March 13, 1942, P.R. Laws Ann. tit. 29 §§467-74 (Act No. 3), provides paid maternity leave for a pregnant employee for the birth of a child. Under Act No. 3 a pregnant employee is generally entitled to eight (8) weeks of maternity leave. The employee must present a medical certificate indicating that she is pregnant and the estimated date of birth. The leave is comprised of four (4) weeks of prenatal leave and four (4) weeks of postnatal leave. However, an employee may remain at work up to one (1) week prior to the estimated date of birth, if she presents a medical certificate which authorizes her to work up to that time. An employee may also return to work as early as two (2) weeks after giving birth, if she presents a medical certificate from her doctor certifying that she can return to work. If the date of birth is delayed, the employee may continue on prenatal leave until the birth of the child without affecting the postnatal leave. Also, if post-natal complications arise, maternity leave may be extended up to an additional 12 weeks of unpaid leave.

Act No. 3 also protects pregnant employees from discrimination and dismissal under certain circumstances. Act No. 3 expressly provides that an employee may not be dismissed due to diminished productivity or a reduction in the quality of work insofar as these reasons will not be considered just cause for termination. Act No. 3 also grants pregnant employees reinstatement rights. Therefore, unless the employee's job has been eliminated for just cause, the employee must be reinstated in the same position that she occupied prior to commencing her maternity leave.

If an employer is found liable for discriminating against an employee due to pregnancy, it will be responsible for double compensatory damages. The employer may also be found guilty of a misdemeanor.

MATERNITY LEAVE FOR ADOPTION

Act No. 3 of March 13, 1942, P.R. Laws Ann. tit. 29 §§467-474 (Act No. 3) also provides maternity leave for adopting mothers of pre-school minors or minors having five years of age or less who are not enrolled in school. Under such circumstances, an adopting mother is entitled to the same maternity leave benefits as a mother who gives birth.

To take maternity leave, the adopting mother must give her employer a 30-day notice of her intention to adopt a child, use maternity leave, and plans to return to work. Also, the adopting mother must submit evidence crediting the adoption procedures issued by the adequate entity. Adoption leave will begin on the date the minor joins the family nucleus. The adopting mother may choose to return to work at any time, waiving her right to the unused part of the leave.

LEAVE FOR BREASTFEEDING OR TO EXPRESS MILK

Act No. 427of Dec. 16, 2000, P.R. Laws Ann. tit. 29 §§478 *et. seq*. (Act No. 427), provides working mothers with a leave for breastfeeding or to express milk. The employer must designate an adequate area for this purpose which must guarantee the nursing mother privacy, safety, and hygiene. The place must have electrical power and ventilation.

A woman who returns to work after maternity leave and who works a daily shift of at least seven and a half hours (7 ½), has a right to breastfeed her baby or express milk for one (1) hour each full working day. This hour may be divided into two 30-minute breaks, or three 20-minute breaks. Businesses covered by the Small Business Administration need only provide breastfeeding mothers a period of 30 minutes per working day, which may be divided into two periods of 15 minutes each.

If the employee is working part-time day and the daily shift exceeds four (4) hours, the period granted will be thirty (30) minutes for each period of four (4) consecutive hours of work.

The breastfeeding leave shall have a maximum duration of twelve months from the date the employee has returned to work after her maternity leave. To take breastfeeding leave, the employee must present a medical certificate during the infant's fourth and eighth month of age, which certifies that the working mother is breastfeeding her baby.

WORKERS' COMPENSATION

The Puerto Rico Workers' Accident Compensation Act, Act No. 45 of April 18, 1935, as amended P.R. Laws Ann. tit. 11 §§1 *et seq.* (Act No. 45), requires public and private employers in Puerto Rico to insure their employees against work-related accidents.

Act No. 45 also requires those employers hiring independent contractors to insure the work hired unless the contractor is both an independent contractor and is already insured. The principal who receives the services of the contractor's employees is known as the "statutory employer" of the latter.

Absent a lapse in coverage, and with few exceptions (e.g., criminal acts, intentional torts), employers are immune from suits arising from the work-related accidents or illnesses of their employees. Statutory employers are also immune from suit. This means all medical treatment, disability, and administrative expenses involved in treating or compensating the injured or ill worker are paid for by the insurer.

The Puerto Rico State Insurance Fund Corporation (SIFC) is the sole, monopolistic workers' compensation insurance provider from which all workers' compensation coverage must be purchased in Puerto Rico.

Works of limited duration (e.g., construction projects), are typically insured through temporary policies. Premiums for temporary policies are based on the type of work to be done and the cost of such work, pursuant to the, "Regulations to Determine the Percentages of Labor in Works Subject to Temporary Policies."

Conversely, premiums for ongoing, so-called "permanent" policies are calculated as a percentage of every $100 of payroll, based on the type of work and industry. For these policies, insurance rates are published in the SIFC's "Manual of Job and Industry Classifications and Types of Insurance," and are periodically revised in hearings open to public comment.

On or before every July 20, employers with permanent policies must report their actual payroll for the policy year that ended June 30 and provide an estimate of their payroll for the following year in the yearly payroll statement form. The policy year runs from July 1 of the prior year to June 30 of the current year. Employers with permanent policies may pay the premium calculated on their anticipated payroll or submit 50% of the prior's year premium with the payroll statement. Although payment at this stage is not due, failure to timely file a payroll statement will result in a lapse in coverage.

The SIFC will subsequently send an invoice with the final calculation of the premium payment due, typically between September and October of the year in course. The final premium amount due will be based on the difference between what was reported as an anticipated payroll on July 20 of the prior year, what was reported as the final payroll on July 20 of the current year, minus whatever premium payment, if any, was submitted with the prior years' payroll statement.

The final balance must be paid on the due-date stated on the notice of premium payment due. Failure to do so by the date specified will result in a lapse in coverage.

Premium payments sent by certified mail are considered made on the date of the postmark, provided the postmarked receipt is legible. Otherwise, payments are considered made on the date the payment is received by the SIFC.

If an employee suffers a work-related accident or illness during a lapse in coverage, the employer is liable to the SIFC for the cost of all medical treatment, disability payments, and administrative expenses incurred by the SIFC in providing treatment to the injured worker. Such lapses may also expose employers to tort suits brought by the employee.

Every work-related accident must be reported to the SIFC within five days. Employees determined by the SIFC to have suffered a work-related accident or illness may be ordered a leave of absence by the agency. In such cases, the worker is entitled to have his/her employment protected and to be reinstated upon conclusion of the leave, provided he or she is discharged from treatment and requests reinstatement within 360 days of the date of the accident or illness and 15 days from the date of discharge. The employee must also be physically and mentally capable of fulfilling his/her job duties, and the employee's position must still exist.

Absent intervening "good cause" for termination of employment during workers' compensation leave, as defined by Puerto Rico Act No. 80, the local severance indemnity statute, the failure to reinstate an employee on workers' compensation leave will expose an employer to a claim for reinstatement, back pay, and consequential damages.

NON-OCCUPATIONAL DISABILITY INSURANCE

Puerto Rico Act No. 139 of June 26, 1968 (Act No. 139) establishes a government-administered benefits program for employees disabled because of non-occupational illness or injury, known as "the Temporary Non-Occupational Disability Insurance" (SINOT, by its acronym in Spanish).

An employer may substitute the SINOT coverage under the government plan with a private plan. However, such a plan must comply with a series of requirements; the most important of which is that the private plan be at least as beneficial to the employee as the government plan. An employer may also request authorization to become self- insured. To substitute the government plan with a private or self-funded plan, an employer must request approval from the Secretary of Labor no later than April 30 of the year in which the plan is to become effective.

Besides payment of insurance benefits, Act No.139 provides eligible, disabled employees a leave of absence and reinstatement rights. That is, upon recovery from disability, the employer must reinstate the employee if:

- The employee requests reinstatement within 360 days from the date of commencement of the disability and within 15 days from the date the worker was discharged from medical treatment.
- At the time of the request, the employee is mentally and physically able to perform his/her duties.
- The employee's job has not been eliminated at the time of the request (the job is deemed existing if occupied by another employee or if reopened and filled by another person within 30 days following the date of the reinstatement request). '

CHAUFFEURS' SOCIAL SECURITY ACT

Puerto Rico has a mandatory government insurance plan, which requires employers to insure any nonexempt employee whose work requires the employee to drive a "motor vehicle" as part of that employee's regular duties. This includes, for example, a forklift car at a warehouse.

The employees covered under the Chauffeurs' Social Security Act are not covered by SINOT. Also, the benefits due to illness will not be paid if such illness is covered primarily by the Workers Accident Compensation Act, or if the insured is receiving pay from his or her employer.

The Chauffeurs' Social Security Act requires that an employer reserve the employee's position for one (1) year and reinstate him/her in his/her position if: (1) the employee requests reinstatement within 30 working days from his/her release from treatment and such petition is made within one (1) year from the beginning of the disability; (2) the employee is mentally and physically capable to occupy the position; and (3) the position exists at the moment of requesting reinstatement.

MILITARY LEAVE

Military and veteran employees have a variety of rights, both under federal and local statutes.

Uniformed Services Employment and Reemployment

Benefits Act ("USERRA")

This federal statute provides for an unpaid leave for members of the Armed Forces of the United States (Army, Marine Corps, Air Force, and Cost Guard, as well as its reserves), National Guard, the Commission of the United States Public Health Services and others designated by the president of the United States during war or an emergency, when called to serve voluntarily or involuntarily. The statute also prohibits discriminatory acts against employees, former employees, or employment candidates because of their service in the military, as well as hostile environment and retaliation.

USERRA also provides for the reinstatement of employees, who are not temporary, who having served honorably, return to work or request reemployment within the period provided by law. Once reinstated, the employee's seniority and all his or her seniority benefits will remain as if the employee had continued to work uninterruptedly.

Puerto Rico's Military Code

This local statute applies to members of the Puerto Rico's Military Forces: Puerto Rico's National Guard (Ground, Aerial, and Inactive, and others designated by the president of the United States or by the Governor of Puerto Rico) and the Puerto Rico's State Guard.

The Act prohibits, under penalty of a criminal offense, that any employer obstructs or does not permit a member of the Puerto Rico's Military Forces to be absent from his work to serve during a training, or in response to a call to serve in the active state military. Also, it prohibits the dismissal of, and discrimination against, an employee because of his absences while serving or for being a member of the Puerto Rico's Military Forces. To prevent a member of the Puerto Rico's Military Forces from obtaining employment or to dissuade him of enlisting in said forces, constitutes a misdemeanor.

The statute also provides for an unpaid leave for employees of the private sector who are members of the Puerto Rico's Military Forces, to be absent and serve as part of their annual training, or to comply with any call to serve. Members of the Puerto Rico's State Guard who are also employees in the private sector, upon an honorably completion of their services or training, have a right to reemployment subject to the conditions provided by the Act.

Puerto Rican Veterans' Bill of Rights of the XXI Century

Any person who has served honorably in the Armed Forces of the United States as defined by the statute, and its reserves, and those who, according to law, are veterans, have certain employment rights. The same applies to individuals who serve in the National Guard.

According to this statute, the employer is obliged to:

- Pay for the employer's and the individual's contributions to the employee's retirement plan during active military service.
- Reinstate the veteran or reservist in the position he or she occupied before going to the military service or in an equivalent or similar position, if the employee requests it within 180 days, following his honorable discharge from the military.
- Add 10 points or 10%, whichever is greater, to the score obtained by the veteran in tests for admission, readmission or promotion, if the veteran obtained the minimum score to qualify.
- Offer the veteran any tests that, because of his/her military service, he/she was not able to take if the employee asks for it within 180 days after returning to work.

Act for the Protection of Members of the Armed Forces of the United States

This statute provides members of the Uniformed Services of the United States, as defined by the statute, the Army Corps of Engineers and the National Disaster Medical System, the payment of the difference between their net salary as a private sector employee, and their net income during their military service.

Also, the statute grants preference for appointment, promotion, or for employment opportunities to members of the Uniformed Services, the State Guard, civil employees of the Army Corps of Engineers and the National Disaster Medical System, with equal academic and technical conditions, or experience, as other employees. It also provides an extra 10 points or 10%, whichever is greater, in addition to any other bonus, to the score obtained by the employee in employment or promotion tests. These employees also have a right to take tests that, because of their military service, were unable to take, if the employee requests it within 180, days following his/her return to work.

According to this statute, the period of military service and the training sessions will be credited for purposes of employment evaluations, if it relates to the functions performed on the civil job.

FAMILY AND MEDICAL LEAVE

The Family and Medical Leave Act of 1993 (FMLA) requires private employers with 50 employees or more to provide certain employees with up to 12 weeks of unpaid leave in a given 12-month period for:

- The birth and care of a newborn child.
- The placement of a son or daughter for adoption or foster care.
- To care for a spouse, son, daughter, or parent with a "serious health condition."
- To take medical leave when the employee is unable to work because of a "serious health condition."
- Any "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter, or parent is on active duty or call to active duty status as a member of the National Guard or Reserve in support of a contingency operation.

An eligible employee who is the spouse, son, daughter, parent, or next of kin of a current member of the Armed Forces (including members of the National Guard or the Reserve) with a serious injury or illness, is also entitled to a total of 26 workweeks of unpaid leave during a "single 12-month period" for the care of the service member.

Upon their return from FMLA leave, employees are entitled to be restored to their original job, or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment.

Under some circumstances, employees may take FMLA leave intermittently, or on a reduced work schedule. When leave is needed for planned medical treatment, employees must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation.

Only employees who have been employed by the employer for at least 12 months (need not be consecutive), and who have worked 1,250 hours or more over the last 12 months of work are eligible to benefits under the FMLA.

The FMLA also requires employers to maintain employees' group health insurance coverage during the pendency of the leave.

FMLA benefits may apply concurrently with other Puerto Rico laws providing leave for the same covered reasons, such as maternity, workers' compensation, and non- occupational disability leaves. Any paid or otherwise compensated leave may also count towards the twelve-week leave entitlement provided by the FMLA.

RIGHT TO PRIVACY

An individual's right to privacy is guaranteed by Article II, sections 1 and 8, of the Constitution of Puerto Rico. Specifically, Article II, Section 8 of the Constitution states that "every person has the right to the protection of the law against abusive attacks on his honor, reputation, and private or family life." The Constitutional right to privacy operates *ex propio vigore* and may be enforced by an individual against his or her private employer without the need for state action. Although fundamental, the right to privacy is not absolute and may yield to compelling circumstances.

In the employment context, to prevail in an action for this type of constitutional violation, the employee must present evidence of the employer's concrete actions that infringe upon the employee's private or family life. In such claims alleging a violation to an employee's constitutional right to privacy, the central focus must be on whether the employee had a legitimate expectation of privacy, given the particular circumstances at hand. In this regard, it is imperative to examine any alleged violation of the constitutional right of privacy always keeping in mind considerations of time and place. The employee must have a real expectation that his or her privacy be respected, and such expectation must be one that society is objectively willing to recognize as legitimate or reasonable. Notwithstanding, the individual's reasonable expectation of privacy must be weighed against the legitimate business interests that his or her employer is seeking to protect through the measures under attack.

To guarantee an individual's constitutional right to privacy, case law has established the conditions employers must observe when, among others, they implement the use of electronic surveillance in the workplace. These will be discussed below.

DRUG TESTING

Puerto Rico Act No. 59 of Aug. 8, 1997 (Act No. 59), 29 P.R. Laws Ann. tit. 29 §§161 *et seq.*, establishes specific requirements for the drug testing of job applicants and employees in the private sector. Although Act No. 59 does not make drug testing mandatory, an employer who establishes a drug testing program must adhere strictly to the provisions of Act No. 59.

Employers may require every job applicant to submit a drug screening test as a condition for employment. While applicants have the right to refuse to submit to the drug testing, an applicant's refusal will be considered as a positive result, and the employer may withdraw the conditional offer of employment.

Drug testing may also be administered to employees in certain sensitive positions; in cases of reasonable individual suspicion; in cases of certain accidents; as a follow-up to a drug rehabilitation program; and as part of a program for random testing.

With respect to implementing disciplinary measures, Act No. 59 states that an employer may impose sanctions upon its employees for violations of its rules of conduct, subject to the provisions of Puerto Rico's unjust dismissal statute, Act No. 80 of May 30, 1976. However, Act No. 59 provides that the first positive result of a drug test shall not constitute just cause of termination of an employee, without first requiring and permitting the employee to attend an appropriate rehabilitation program.

In Puerto Rico, there are no laws, rules or regulations concerning alcohol policies and/or alcohol testing in the private employment sector. However, taking a blood sample to conduct alcohol testing in the employment context may violate the express right to privacy guaranteed by Article II, Sections 1 and 8 of the Constitution of Puerto Rico. Notwithstanding, many private employers have ventured into this unsettled area of law and have established alcohol policies in their facilities. Employers have counterbalanced the employees' constitutional privacy rights against the employer's constitutional and statutory duty to provide a safe workplace and have decided in favor of policies prohibiting alcohol abuse.

ELECTRONIC SURVEILLANCE

In Vega v. Telefónica de Puerto Rico,156 D.P.R. 584, 613 (2002), the Supreme Court of Puerto Rico held that a telephone company's video recording security system, part of which recorded the activities of working employees, was not *per se* a violation of the constitutional right to privacy. The Court emphasized that an employer has a right to protect its private property through reasonable and legitimate means, such as electronic surveillance.

However, the Court left open the possibility that, depending on the circumstances, an employer's electronic surveillance system could breach an employee's constitutional right to privacy. The Court laid down a number of rules that the employer must comply with to ensure that its electronic surveillance systems are valid.

When implementing electronic surveillance measures in the workplace, an employer must provide prior notice to its employees, except in cases where extreme circumstances justify otherwise. This notification could include, among other things, information regarding: (a) the type of electronic surveillance to be used; (b) the nature of the data or information to be obtained; (c) the frequency with which the surveillance system is to be used; (d) its technical specifications; (e) the place where the surveillance system will be installed; (f) the location of the monitoring equipment; (g) the group of employees that will be observed through the surveillance system; and (h) the administrative mechanism available to channel employee grievances or complaints concerning the electronic surveillance system.

Generally, employers should not install a system of electronic surveillance in areas where, by their own nature (*i.e*., restrooms, showers, dressing rooms), employees will have an enhanced expectation of privacy. Employers must also create and distribute among their employees a clear and adequate policy detailing the use, access, and disposition of the information collected and/or recorded by the electronic surveillance system.

RESTRICTIONS ON THE USE OF EMPLOYEE'S SOCIAL SECURITY NUMBERS

Act No. 207, Sept. 27, 2006, and its Regulation 7413, prohibit the use of employees' Social Security numbers on identification cards or any document of general circulation. Employees' Social Security numbers may not be displayed in places which are visible to the public; may not be included in personnel directories; nor may they be included in any list which is made available to persons who do not have a need to know or access authorization to this information.

The prohibitions provided in Act No. 207 may be waived by the employee in writing and voluntarily. Said waiver cannot be a condition for or of employment. Some exceptions to Act No. 207 include situations in which a local or federal statute or regulation, specifically authorize or require the divulgation of the Social Security number.

BACKGROUND CHECKS OF APPLICANTS AND WORKERS

The issue of background checks raises the question of potential liability for invasion of privacy under the Puerto Rico and the United States Constitutions, regardless of whether the employer conducts its own checks or hires a third party to do so. Misuses of background checks may also give rise to liability if employment decisions based on background-check information have an adverse impact on protected classes in violation of federal and Puerto Rico anti-discrimination laws. Nonetheless, there are some allowable background checks.

Regarding criminal background checks in particular, it is common practice in Puerto Rico to request a certificate of good conduct (i.e. a certification from the Police Department that a person lacks a criminal record) as a condition or requisite for employment. However, employers may not use criminal records to make employment decisions where such use causes a disproportionate impact on protected classes in violation of federal and Puerto Rico anti-discrimination laws. It has been held that not hiring an applicant due to having a criminal record may amount to social-condition discrimination in employment.

Another common type of background check sought by employers is the credit check. To lawfully perform in Puerto Rico a credit check for candidates and employees, these should be performed only for workers assuming roles where financial management and/or transactions are a function of the job. Moreover, the employer must abide by pertinent requirements under the Fair Credit Reporting Act of 1970 (FCRA). Under the FCRA, an employer, through a credit reporting agency, can assess a job applicant's background information. When an employer is seeking to obtain a credit report, the FCRA imposes the following obligations from employers: prior notification; consent by the applicant or worker; a notice of use and a copy of the report to the applicant or worker; and a certification of compliance to the agency.

An employer may verify the educational, licensing, and work-experience credentials of an employment candidate insofar as said credentials are either required qualifications for a job in question, or otherwise taken into consideration in assessing candidates for the job to select the one that is best qualified. Furthermore, under applicable disability laws and privacy rights in Puerto Rico, pre-employment physical examinations are only lawful if the same are narrowly tailored to determining the fitness to perform the specific job that is being offered. Finally, the verification of drivers' licenses and records are lawful for those employees who either must drive as a part of their jobs or are given a company car.

EMPLOYMENT ELIGIBILITY VERIFICATION

Puerto Rico is fully under U.S. federal jurisdiction for all immigration matters. As such, employers here are required to comply with the employment eligibility verification requirements established under the Federal Immigration Reform Control Act of 1986 (IRCA). Under IRCA, employers are required to complete a Form I-9 (Employment Eligibility Verification Form) to confirm that every employee being hired is authorized to work in the U.S. Under Form I-9's verification process, workers being hired must provide, and their employer shall verify, documentation that confirms both the workers' identity as well as their eligibility for employment in the U.S. Form I-9 contains a list of acceptable documents to verify identity and employment eligibility.

Employers should make sure to use the version of Form I-9 that is current on the date when it is completed. The U.S. Citizenship and Immigration Service's website, at www.uscis.gov, contains information regarding the version of Form I-9 that is current at any given time, as well as an employer handbook with instructions for completing Form I-9 in full compliance with the law. Non-compliance with Form I-9 requirements, including incomplete and/or erroneous information on the form, can lead to costly monetary fines and other sanctions against employers, including criminal prosecution in some cases. Moreover, Puerto Rico's Act No. 48 of May 29, 1973, P.R. Laws Ann. tit. 29 §153, provides that any worker in Puerto Rico who is dismissed without just cause and replaced with an alien who is not authorized to work may seek reinstatement and back pay. Employers must retain Form I-9 for the later of either three (3) years after a worker's employment start date or one (1) year after the date when his/her employment ends.

Employers also have available the tools of the program known as E-Verify (which is mandatory for covered federal contractors and sub-contractors, as well as for federal government agencies). E-Verify is an Internet-based program run by the federal government, that allows employers to verify their employee's eligibility to work in the United States. In general terms, the program compares the employee's information included in the I-9 form with millions of records of the U.S. Department of Homeland Security and the Social Security Administration, to confirm the eligibility of the candidate for employment. The program is fast and free of cost and provides mechanisms and terms to correct discrepancies in the information. Employers may obtain additional information or register with the program in the following Internet page of the USCIS: www.uscis.gov/e-verify.

Notwithstanding the strict employment eligibility verification requirements under Form I- 9, it is unlawful to discriminate against employment candidates or workers due to their national origin and/or citizenship. U.S. federal and Puerto Rico statutes provide multiple penalties against employers and remedies for workers who are discriminated against on those grounds, including monetary penalties, reinstatement, and the payment of damages.

UNIFORMS

An employer who requires its employees to wear uniforms to work, must furnish them, free of charge, pursuant to the provisions of Act No. 180 of July 27, 1998 (Act No. 180), P.R. Law Ann. Tit. 29, §250e. In the case of employers in the health area, these are required to supply uniforms, or the equivalent amount of money to purchase the same, to nurses, laboratory technicians, radiology technicians, therapists, or any other health professional technician whose practice requires the use of uniforms.

It should be noted that the Puerto Rico Department of Labor has taken the position that an employer must defray the cost of laundering any uniforms it requires its employees to wear. However, this is not a statutorily required action and the Department has been lax on the enforcement of its position.

LABOR RELATIONS

The National Labor Relations Board (NLRB) was created under the National Labor Relations Act (NLRA) of 1935, as amended by the Taft-Harley Labor Act of 1947 (also known as the Labor-Management Relations Act), to administrate the NLRA, the primary law governing relations between unions and employers in the private sector. The statute guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activities with or without a union, or to refrain from all such activity. The NLRB exercises jurisdiction over cases involving businesses whose activities affect interstate commerce. Puerto Rico is in the 12th Region of the NLRB, based in Tampa, Florida with a sub-regional office in Hato Rey, Puerto Rico.

It should be mentioned that under the amendments of Act No. 4 of 2017 (Labor Reform of 2017), the employees covered by a collective agreement are not subject to Act No. 80 of 1976 (dismissals) or Act No. 180 of 1998 (vacation, sick leave and local minimum wage).

The Taft-Hartley Act is better known for its application to labor relations between employers and labor unions. However, the statute protects all employees in the interstate commerce, regardless of whether they are represented by a union. If two or more employees engage in concerted, protected activity for their mutual aid and protection, they will be shielded from discrimination under this law.

The NLRB has decided several important cases related to the employees' right to engage in concerted, protected activities. Likewise has the NLRB's General Counsel opined. In sum, they have stated that the employers' rules of conduct and policies about the use of social media violate the law if they have the effect of interfering with the employees' right to engage in concerted, protected activities. For example, a rule that has the effect of prohibiting employees from sharing with other employees in the social media their negative view of their working conditions would be contrary to the rights guaranteed by the Taft-Hartley Law. This has fostered numerous controversies and cases about the legality of what would otherwise appear as valid policies and rules of conduct.

Locally, Act No. 130 of May 8,1945, as amended, P.R. Laws Ann. tit. 29 §§61 *et seq.* (also known as the Puerto Rico Labor Relations Act), was enacted to promote collective bargaining principles, to reduce certain labor disputes and to encourage economic productivity.

Act No. 130 created The Puerto Rico Labor Relations Board (PRLRB), a quasi-judicial organism authorized to consider and adjudicate labor disputes, after they have been evaluated and investigated by the agency. The PRLRB is authorized to determine and recognize employees' representatives for the

purposes of collective bargaining, to determine the appropriate units of workers for collective bargaining, to investigate and resolve controversies concerning representation, to consider cases regarding unlawful labor practices, and to enforce mediation decisions. It also has discretion to implement determinations made by competent organisms in cases of labor disputes.

The PRLRB jurisdiction is limited to agricultural workers, non-agricultural employees of private businesses over which the NLRB does not have jurisdiction, employees of the Commonwealth of Puerto Rico government's public corporations or agencies dedicated to businesses whose purpose is to derive pecuniary gains, and those of employers who engage in interstate commerce in cases where a violation of a collective bargaining agreement is alleged.

PERMITS THAT THE

SECRETARY OF LABOR AND HUMAN RESOURCES ISSUES

Approval of settlement of judicial or extrajudicial claims by nonexempt employees for compensation of services rendered. (Article14 of Act No. 379 of May 15, 1948, 29 LPRA §282.)

Permit to deduct from the wages of a non-exempt employee a sum stipulated by the employee as an assessment or payment toward any plan or group, pension, saving, retirement, allowance, annuity life, life, accident, and health and hospital insurance policy, any combination of these plans, or any similar social security plan in case of the nonexistence of a duly certified or recognized labor organization. (Section 5 of Act No. 17 of April 17, 1931, 29 LPRA §175(g).)

Permit for the employment of minors between 14 and 16 years of age in any gainful occupation. (Act No. 230 of May 12, 1942, 29 LPRA §432.)

LEGALLY MANDATED NOTIFICATIONS

Here follows a list of several notifications that employers need to post in a conspicuous place in the establishment, shop, factory, plantation, office or other place of work, the following printed notices:

Anti-Discrimination Unit

- Sexual Harassment.

- Discrimination is Illegal (Includes sex, pregnancy, nursing period, sexual harassment, and disability - Act No. 44 of July 2, 1985, discrimination, and the General Regulation of the Antidiscrimination Unit, Preventive Action and Records).
- Poster regarding the rights and responsibilities under Act No. 22 (sexual orientation and sexual identity), to be issued by the local Department of Labor.

Equal Employment Opportunity Commission ("EEOC")

- The Equal Employment Opportunity is the Law (Includes race, color, religion, sex, national origin, disability, age, and genetic information discrimination, sex discrimination in the payment of salaries, retaliation and, for employers who are federal contractors, Veterans with Medals for Armed Forces Services and Disabled Veterans, Recently Separated and other Protected Status.

Labor Standards Bureau

- Summary of some of the legislation that the Labor Standards Bureau administers for the protection of workers and employees. (Includes Act for Severance Payment in Terminations without Cause, Day of Work, Day of Rest for Every 6 days of Work, Vacation and Sick Leave, Definition of the Terms "Administrator," "Executive," and "Professional," Annual (Christmas) Bonus, Act for the Regulation of Commercial Establishments, Act for the Employment of Minors and Preparation and Keeping of Payrolls, Registers, and Filing System.)
- Notice, Work Hours for Workers and Employees.
- Notice, Alternate Work Hours for Workers and Employees.
- Act No. 207 of Sept. 27, 2006, about the Restrictions in the Use of the Social Security Number.

Employment Security Bureau

- Summary of benefits.

Non- Occupational Disability Insurance Program (SINOT)

- Summary of benefits.

Puerto Rico Administration of Occupational Security and Healt

- Security and Health in Employment Act of Puerto Rico (Puerto Rico OSHA and the US Department of Labor Occupational Security and Health Administration).

Employers in Puerto Rico are also required to display in a conspicuous place in the establishment, shop, factory, plantation, office, or other place of work, the following printed notices of federal statutes that may apply:

- The Fair Labor and Standards Act.
- Title VII of the Civil Rights Act of 1964.
- Americans with Disabilities Act.
- The Age Discrimination in Employment Act of 1967.
- The Rehabilitation Act of 1973.
- Vietnam Era Veterans Readjustment Assistance Act and the Veterans with Special Disabilities Act.
- Affirmative Action Appropriate under Title VII.
- Office of Federal Contract Compliance Programs.
- Family and Medical Leave Act of 1993.
- The Occupational Safety and Health Act of 1970.
- The Employee Polygraph Protection Act of 1988.
- The Genetic Information Non-Discrimination Act of 2008.

The corresponding notices to these statutes and regulations are included in "The Equal Employment Opportunity is the Law" poster.

The Puerto Rico Department of Labor and Human Resources provides posters that include several of these notifications in a single document. These are available in the Central Office or in the Regional Offices of the Department.

DISCLAIMER

This summary is not intended as legal advice or consultation; for specific cases, you should consult an attorney. It also does not include all the applicable laws, regulations and case law. The labor and employment law field is dynamic and changes constantly; some of the matters covered above may

have changed or may change subsequent to the drafting of this summary. Furthermore, the translations of statutory text are unofficial. Finally, some of the sections are based on the position or interpretation of the corresponding government agencies and we may not necessarily agree that a court of law should or will give such interpretations to those matters.