



# ICLG

The International Comparative Legal Guide to:

## **Employment & Labour Law 2016**

**6th Edition**

A practical cross-border insight into employment and labour law

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## EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Employment & Labour Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of labour and employment laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters examine issues when structuring international employment arrangements for multi-national companies and global employment standards and corporate social responsibility.

Country question and answer chapters. These provide a broad overview of common issues in labour and employment laws and regulations in 43 jurisdictions.

All chapters are written by leading labour and employment lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Elizabeth Slattery and Jo Broadbent of Hogan Lovells International LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at [www.iclg.co.uk](http://www.iclg.co.uk).

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# Colombia

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## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The main sources of employment law are:

- The Labour Code (Law 141 of 1961), as amended and complementary laws.
- Laws which govern similar cases (analogy).
- Jurisprudence.
- Custom or use.
- Doctrine.
- The conventions and recommendations adopted by international organisations.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

All individuals that render subordinated services in the Colombian territory are protected. Workers are distinguished depending on the duration of the contract, the type of salary, and the type of activity they develop.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

The employment contracts can be verbal or in writing. However, there are certain kinds of stipulations that are valid only if set forth in writing, such as the stipulation of a trial period, or the stipulation of the so-called integral salary, or the stipulation of the duration of the contract for a fixed term rather than for an indefinite term.

### 1.4 Are any terms implied into contracts of employment?

The following terms are implied in contracts of employment:

- Thirty days' notice to terminate fixed-term contracts of longer than one month.
- Prior notice before application of some of the just causes of termination of employment.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The following minimum employment terms and conditions are set down by law:

- Minimum legal wage.
- Payment of mandatory labour benefits and vacation.
- Registration and contributions to social security and payroll taxes.
- Payment of indemnification to the employee in case of unilateral termination without just cause.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Collective bargaining mainly refers to stability in employment, yearly salary increase of the percentage determined by the Government and extra-legal benefits, permits and licences.

Depending on the type of union (company union or an industry union), the bargaining takes place at company or industry level.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

To be recognised, a trade union must follow the following rules:

- Employee's trade unions need a minimum of 25 members; employer's trade unions need a minimum of five members.
- A preliminary meeting must be held to organise the union, and the name of all the members, their identification, the activity they follow and what binds them to each other and the name and purpose of the association, must be recorded in the corresponding minutes.
- The employer and the Labour Inspection must be notified of the intention to organise a union, indicating the names of the organisers and members of the Board Directors and their identifications.
- The union must be registered before the Ministry of Labour within five days following the day the preliminary meeting to organise the union was held.

### 2.2 What rights do trade unions have?

Trade unions have the following rights:

- Association right.
- Negotiation right.
- Strike right.

**2.3 Are there any rules governing a trade union's right to take industrial action?**

No specific rules exist in this regard.

**2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?**

Employers are not required to set up formal works councils for negotiation of the collective bargaining agreement. They only need to designate representatives for the negotiation.

**2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?**

This is not applicable in Colombia.

**2.6 How do the rights of trade unions and works councils interact?**

This is not applicable in Colombia.

**2.7 Are employees entitled to representation at board level?**

This is not applicable in Colombia.

**3 Discrimination****3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?**

Employees are protected against discrimination. Employees may not be discriminated against due to their age, sex, religion, race, political affiliation, economic condition or health (disability or illness).

**3.2 What types of discrimination are unlawful and in what circumstances?**

Any discrimination preventing access to employment, equal employment conditions or denying employment is unlawful.

**3.3 Are there any defences to a discrimination claim?**

Yes. For example, in case of a *tutela* action or a labour harassment claim due to discrimination, the employer has the right to defence within the corresponding procedure to evidence a lack of discriminating activity.

**3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?**

The employees may initiate *tutela* actions or administrative or judicial labour actions. Claims regarding discrimination rights may be settled before or after the action has been initiated.

**3.5 What remedies are available to employees in successful discrimination claims?**

The following remedies are available:

- Reintegration to the job with payment in case of termination of contract (special indemnifications may apply depending on the cause for discrimination).
- Granting of equal conditions of employment.
- Hiring in case the candidate complies with the required conditions for the job.

**3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?**

No. The "atypical" workers have the same rights and the same protections as the "typical" workers.

**4 Maternity and Family Leave Rights****4.1 How long does maternity leave last?**

Maternity leave is equivalent to fourteen (14) weeks.

**4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?**

A woman has the following rights during maternity leave:

- Leave of absence of fourteen (14) weeks, with pay.
- Protection from termination without just cause and without the approval of the Ministry of Labour.
- If the termination takes place without the authorisation of the Ministry of Labour, the worker has the right to reintegration with payment of all the amounts not paid between the termination of the contract and the reintegration to the job. Further to the above, the worker has the right to claim the payment of an indemnification equivalent to sixty (60) days' salary.

**4.3 What rights does a woman have upon her return to work from maternity leave?**

A woman has the right to two periods of rest, of 30 minutes each, during the work day to feed the child without any wage deduction during the first six months after childbirth (approximately three months after returning to work).

The woman may also have the right to additional periods of rest when she presents a medical certificate as justification.

**4.4 Do fathers have the right to take paternity leave?**

Male workers (fathers) have the right to paternity leave equivalent to eight (8) business days, with pay, from the day of childbirth.

**4.5 Are there any other parental leave rights that employers have to observe?**

No additional parental leave rights are provided in the law (except in cases of abortion or adoption). Only those rights granted separately (i.e. additional days of leave agreed in employment contracts, collective bargaining agreements, etc.) need to be observed.



#### 4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

Only in case the parties agree on flexi-time work. The entitlement to work flexibly is not mandatory by law.

### 5 Business Sales

#### 5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Yes. On a business sale or on an asset transfer of a specific area of the business (if the employees' activity is continued), the employees automatically transfer to the buyer under the employer's substitution figure.

#### 5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

A business sale does not extinguish, suspend or modify the existing employment contracts; thus, all the employees' rights are transferred. The business sale should not affect the rights provided in collective agreements.

#### 5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

From a labour point of view, the employer does not need to consult or inform the employees (nor the labour authorities) about the sale of a business.

#### 5.4 Can employees be dismissed in connection with a business sale?

Yes, but the former or the new employer, to terminate the employment contract of some employees of the company, will have to pay the indemnification for termination of the contract without just cause and respect the legal provisions regarding protections against mass dismissals.

#### 5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Employers are not able to change the terms and conditions based on the business sale. To modify the terms and conditions of employment, the express agreement of the employees will be required.

### 6 Termination of Employment

#### 6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

The following termination notices have to be given by employers:

- In fixed-term contracts agreed for a fixed period of longer than one month, a termination notice has to be given by

the employer at least 30 days before the expiration of the stipulated term.

- To apply some of the just causes provided in the law (i.e. retirement, etc.), the employer has to give 15 days' prior notice of the termination.

#### 6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes, this is possible.

#### 6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

- Some employees have a special protection from dismissal without the existence of a just cause and without the prior authorisation from the Ministry of Labour (i.e. pregnant employees, employees on sick leave, handicap employees, some union directors and board members, or collective dismissal). If terminated without compliance of the above, they will have the right to claim reintegration to their jobs.
- An employee is treated as dismissed when the employment agreement is terminated unilaterally by the employer with or without just cause.
- Yes, in cases of special protection (as explained in i) above), prior authorisation from the Ministry of Labour is required.

#### 6.4 Are there any categories of employees who enjoy special protection against dismissal?

Please see the response to question 6.3 above

#### 6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

According to Colombian law, the employer could dismiss an employee based on the occurrence of a just cause, which are expressly listed in the law. In cases where no just cause exists, the employee will be entitled to receive an indemnification which should be estimated as follows:

- For contracts entered into for an indefinite term of duration, this indemnification applies as follows: (i) for employees with a salary of less than ten (10) minimum legal monthly salaries: thirty (30) days' salary for the first year of services plus twenty (20) additional days of salary for each of the years following the first and proportionally for fractions of years; (ii) for employees with a salary of ten (10) minimum legal monthly salaries or more: twenty (20) days' salary for the first year of services plus fifteen (15) additional days of salary for each of the years following the first and proportionally for fractions of years; and (iii) workers that on December 27, 2002 had ten (10) or more years of continuous service have the right to an indemnification equivalent to forty-five (45) days for the first year of service and forty (40) days for each year subsequent to the first and proportionally for fractions of years.
- For contracts entered into for a fixed period of duration or for the duration of a specific job, the indemnification is equivalent to the salaries corresponding to the pending period of the contract, but in no event less than fifteen (15) days' salary.

## 6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

If an employer is going to terminate an employment agreement with just cause, first they will have to call the employee to hear his/her explanations on the charges (just cause) and present the corresponding evidence. If the explanations are not satisfactory or sufficient to the employer, and if it wants to proceed with the termination, then it has to send a termination notice to the employee indicating the just cause. Also, according to the law and the jurisprudence, some of the just causes have a previous procedure that have to be followed (i.e. low performance requires at least two notices asking the employee to improve performance); otherwise, eventually the employee could claim the payment of the indemnification for termination of the labour contract without just cause.

## 6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

The employee can initiate *tutela* or ordinary labour actions claiming payment of any outstanding labour rights, indemnification for unilateral termination or reintegration to the job if dismissed when being under special protection (i.e. maternity leave, etc.). The remedies, depending on the claim, will be the payment of the corresponding amounts and sanctions, if applicable (updated), special indemnifications and reintegration to the job with payment of the outstanding amounts.

## 6.8 Can employers settle claims before or after they are initiated?

Yes. It will be possible to agree the settlement of claims with the employee before or after they are initiated, by paying a settlement bonus.

## 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. If an employer wants to dismiss a number of employees at the same time, the employer has to obtain prior authorisation from the Ministry of Labour (based on some specific causes provided in the law) to terminate the employment agreements; otherwise, it may be guilty of mass dismissal which will have the effect of the terminations being understood as not having occurred and therefore the personnel will have to be reintegrated to their jobs.

Once the authorisation has been granted, the employer can terminate the employment agreements by paying the corresponding indemnification for termination without just cause.

The above-indicated authorisation will not be required in cases where the employer agrees a termination with the employees by mutual consent by offering to pay a termination bonus, which should be equivalent at least to the value of the indemnification plus an additional amount (to be attractive for the employees to agree on the termination by mutual consent).

## 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

If an employer does not obtain the authorisation from the Ministry of Labour indicated above to dismiss a number of employees at

the same time, the dismissal (depending on the total number of employees working for the employer and the number of employees being terminated) could be considered as mass dismissal and therefore the employees could claim the reinstatement of their jobs and payment of all the labour obligations caused between the termination date and the reinstatement date.

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

Restrictive covenants that do not violate the minimum rights established in the labour law or that are included in settlement agreements (either executed in private or before a labour court or a labour inspector which do not violate the legal labour rights) are recognised.

### 7.2 When are restrictive covenants enforceable and for what period?

Restrictive covenants are enforceable upon execution of the corresponding documents. There is no time limit to enforce them and they will be enforceable in accordance with the agreement of the parties.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

Only in the event of the execution of a settlement agreement; in which case it will have the effect of *res judicata* (the employee should waive some or all of his/her rights and the employer should compensate such waiver).

### 7.4 How are restrictive covenants enforced?

Restrictive covenants are enforced through court proceedings.

## 8 Data Protection and Employee Privacy

### 8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Colombian employers have the obligation to respect the employee's data protection rights; therefore, in cases where an employer is required to collect, use or transfer (in Colombia or to any other country) any information related to the personal information of its employees, it will need to obtain their prior authorisation. Thus employers may not transfer employee personal data freely to other countries.

### 8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes, the employees have the right to obtain copies of their own personal information that is held by the employer.

### 8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, as long as an express written authorisation is obtained from the candidate.

### 8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Colombian law does not have a provision that entitles or prohibits the employers to/from monitoring the employees emails, telephone calls or use of an employer's computer system; however, in order to avoid violation of employees data privacy rights, it is recommended to obtain prior express written authorisation from the employees to do such monitoring.

### 8.5 Can an employer control an employee's use of social media in or outside the workplace?

The employer can control (i.e. regulate the use and access during the working schedule) an employee's use of social media in the work place. Such control outside the work place is not allowed.

## 9 Court Practice and Procedure

### 9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

The following courts and tribunals have jurisdiction:

- Supreme Court of Justice (Labour Appeals Court).
- Labour tribunals (second instance).

- Labour judges or judges with mixed jurisdiction.
- Other judges for *tutela* action.

### 9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

- i) Depending on the claim, the judicial procedures that apply to employment-related complaints are, *inter alia*: ordinary labour proceedings; enforcement proceedings; union immunity proceedings; cassation; arbitration; labour harassment actions; and *tutela* actions.
- ii) In employment-related complaints, conciliation is not mandatory before a complaint can proceed.
- iii) Employees do not have to pay any official fee to the court to submit a claim.

### 9.3 How long do employment-related complaints typically take to be decided?

The time varies depending on the action and the court, but for ordinary labour proceedings it may be estimated as follows:

- In first instance (labour judge), it can take between six months and two years.
- In the tribunal (second instance – Court of Appeal), it can take between six months and three years.
- In the Supreme Court of Justice (cassation), it can take two to eight years.

### 9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes. Please refer to the estimates above.



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**Admitted to Practice:** Colombia, 2010.

**Languages:** Spanish and English.

**Professional Experience:**

- Cardenas & Cardenas Abogados Ltda. Associate (since 2010).
- Arboleda Valencia Asociados. Junior Attorney (2009–2010).



The firm is recognised for its commitment to understanding the needs of its clients and as counsellors in the different legal areas of services covered by its practice.

The firm's practice is committed to high quality and innovation, both for local and international clients, always under excellent standards of ethical commitment, seriousness and professionalism.

Today the firm has a prominent group of lawyers (more than 50) that respond effectively to client needs.

The constant contact with a diverse number of clients enables the firm to be at the forefront of the provision of experienced professional legal services.

The firm's network abilities allow it to benefit from broad international support.

## Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks



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