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GUIDE

Puerto Rico
RIGTHS & DISCRIMINATIONS

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Puerto Rico Payroll Compliance Guide

By Torres CPA Group
Puerto Rico

Understanding the Puerto Rico Payroll system and its interrelation with United States is crucial for individuals and entities doing business in Puerto Rico. Puerto Rico is not a state; it's a territory, with its own Business and Payroll laws and regulations.

The following White Paper is designed to give an insight Payroll Issues in Puerto Rico. It provides relevant background information, which will be of assistance to organizations considering establishing business in the Island. Nonetheless, it is highly recommended to seek advice and counsel from qualified professional sources before undertaking any business.

Certain exclusions and exemptions may apply and when specific problems occur in practice, it will often be necessary to refer to the laws and regulations of Puerto Rico, and to obtain appropriate accounting and legal advice.

It is understood that the following overview does not constitute any formal rendering of either legal, accounting, tax or professional services. If legal advice or other assistance is required, an attorney, CPA or tax adviser should be consulted.

Torres CPA Group is an Advice Certified Public Accounting Firm offering Audit, Tax, Consulting and Financial Outsourcing services for over 33 years. If you require any further information or help, please do not hesitate to contact us.

EMPLOYMENT RIGHTS AND DISCRIMINATION

PR. Laws 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, or marriage, or for being a victim or perceived victim of domestic violence, sexual aggression or stalking. The law 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. The law also requires employers to provide reasonable accommodation to employees who are victims of domestic violence, stalking and/or sexual aggression.

The law provides that a rebuttable presumption of discrimination against employers will arise when an employer dismisses an employee who belongs to one of the protected categories without just cause. The employer may rebut the presumption of discrimination by establishing that the adverse employment action was based on legitimate business reasons and not discriminatory.

P.R. Laws prohibits discrimination against persons with disabilities who can perform the essential duties of their position, with or without reasonable accommodation.

P.R. Laws prohibits the dismissal, suspension, reduction in salary or any type of discrimination against working mothers and expressly prohibits the dismissal of a pregnant employee as a result of her diminished productivity or quality during pregnancy. Similarly provides several prohibitions aimed at discouraging and penalizing sex discrimination in the workplace. Finally, there is a special statute regarding sexual harassment.

Discrimination in the workplace is also prohibits employment discrimination because of sex, race, color, national origin or religion ,sexual orientation and gender identity.

Sex discrimination is further prohibited 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 prohibits employment discrimination because of age. It protects any employee of 40 years of age or more who has been dismissed, subjected to adverse employment actions or otherwise discriminated against on the basis of age.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act applies to all employers in 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 considered a form of discrimination under the ADA.

The ADA defines an individual with a disability as one who has a physical and/or mental condition that substantially limits his or her ability to perform at least one major life activity, when compared to the average individual. Included in the definition: an individual who has a record of a disability and an individual who is considered by the employer to have disability, whether or not he or she does. As a result, employers' adverse actions that are based on stereotypes or unfounded ideas regarding persons with disabilities 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 or her performance of the essential job functions and on 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 if it can demonstrate that the accommodation is unduly burdensome to 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 discrimination against persons who are associated with or related to an individual with a disability.

The ADA determination of who is an individual with a disability must be liberal, so as to extend the protections against discrimination and the right to reasonable accommodation in employment to an increased number of individuals that have physical and/or mental conditions. It will not be relevant if an individual mitigates or uses corrective measures such as prosthesis, medications and surgery (with the exception of eyeglasses) to ameliorate his or her impairment or whether these measures allow the individual to adequately perform major life activities. The determination of who is an individual with a disability 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.

RETALIATION

P.R. Laws prohibits employers from retaliating against an employee by reason of said employee's participation in an activity protected by the statute.

An employer may not dismiss, threaten or discriminate against an employee with respect to the terms and conditions of his or her employment if the employee provides information concerning the employer's business in various forums, as long as the employee's statements are not defamatory and do not constitute disclosure of privileged information. This is the case if the employee offers or attempts to offer, verbally or in writing, any testimony, statement or information concerning the employer's business: (1) before any legislative, administrative or judicial forum in Puerto Rico; (2) in the internal procedures established by the employer; or (3) to any employee or company representative in a position of authority. An employer that dismisses or in any other way affects an employee's terms and conditions of employment as a result 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

Puerto Rico's general statute against unjust dismissal, prohibits the dismissal of an employee as a result of his or her participation as a witness 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 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. Act No. 379 of May 15, 1948,

P.R. Laws regulates hours of work and overtime pay, contains an anti-retaliation provision that protects employees who refuse to accept a flexible schedule agreement under said statute.

There are various federal statutes that 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.

SEXUAL HARASSMENT

P.R. Laws prohibits sexual harassment at work. Sexual harassment consists of unwelcome sexual advances, requests for sexual favors or any conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) 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. The law 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 communicate to employees and supervisors their policy against sexual harassment. To comply with this obligation, employers must take necessary measures 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 necessary corrective measures.

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

PROTOCOL TO HANDLE DOMESTIC VIOLENCE IN THE WORKPLACE

PR laws 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 or 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 developing and implementing the protocol. The Puerto Rico Department of Labor and Human Resources will monitor full compliance with the protocol, as to both the existence of the document and the training of employees.

The law extended the protection to same-sex couples, consensual couples and immigrants without regard to their migratory status

PROTOCOL REGARDING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

PR law prohibits discrimination in employment based on sexual orientation and gender identity.

The protocol covers matters such as the obligation of the employer to publicize the scope related statutes; the confidentiality of the information regarding 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 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 the denial of access to restrooms identified by gender to employees who identify with that gender. Also, the protocol identifies as evidence of illegal harassment requiring a person to dress in a manner that is inconsistent with the gender with which that person identifies or that precludes the person from expressing his or her gender identity.

RIGHT TO PRIVACY

An individual's right to privacy is guaranteed by the Constitution of Puerto Rico. 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 other things, they implement the use of electronic surveillance in the workplace. These will be discussed below.

ELECTRONIC SURVEILLANCE

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: (1) the type of electronic surveillance to be used, (2) the nature of the data or information to be obtained, (3) the frequency with which the surveillance system is to be used, (4) its technical specifications, (5) the place where the surveillance system will be installed, (6) the location of the monitoring equipment, (7) the group of employees that will be observed through the surveillance system and (8) the administrative mechanism available to channel employee grievances or complaints concerning the electronic surveillance system.

As a general rule, employers should not install a system of electronic surveillance in areas where, by their own nature, employees will have an enhanced expectation of privacy (i.e., restrooms, showers, dressing rooms). 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 EMPLOYEES' SOCIAL SECURITY NUMBERS

PR Act 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 that are visible to the public, may not be included in personnel directories, and may not be included in any list that is made available to persons who do not have a need to know or access authorization to this information.

The prohibitions provided in Act may be waived by the employee in writing and voluntarily. Said waiver cannot be a condition for or of employment. Some exceptions to Act include situations in which a local or federal statute or regulation specifically authorize or require the divulgation of the Social Security number.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT OF 1988

An employer with 100 or more employees, excluding part-time employees, or with 100 or more employees who in the aggregate work at least 4,000 hours per week must provide a written notice at least 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 to the mayor of the municipality where the plant is located. It must also be given to the labor union, if any.

The WARN Act 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" is defined as a reduction in force that: (1) is not the result of a plant closing and (2) results in an employment loss at the single site of employment during any 30-day period for:

At least 500 employees (excluding part-time employees); or

At least 50 employees (excluding part-time employees), provided that at least 33% of an employment site's full-time employees are affected.

The WARN Act defines the term "part-time employee" as: (1) an employee who is employed for an average of fewer than 20 hours per week or (2) an employee who has

been employed for fewer than six of the 12 months preceding the date on which notice is required.

Although the full 60-day notice requirement under the WARN Act 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 situations under the WARN Act in which an employer can give less than 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 60 days' notice where, among other things: (a) it was seeking additional capital or business which the employer lacked at the time 60 days' notice of the closing would have been required; (b) the capital or business, if obtained, would have enabled the employer to avoid or postpone shutdown; and (c) 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: A company can provide less than 60 days' notice 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: A company can provide less than 60 days' notice when the plant closing or mass layoff is the direct result of a natural disaster, such as a flood, earthquake, storm or drought.