

Employment & Labour Law

Second Edition

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Dominican Republic

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Introduction

In this chapter we will look at a controversial topic in Dominican labour legislation: the method to determine the amount of salary that shall be taken into consideration to calculate severance and vested rights once a labour contract is terminated. The termination of labour relationships is the single biggest cause of litigation between employers and employees and, beyond the causes of the termination and the existence of the labour relationship, quantification of the salary so as to calculate severance and vested rights is the main debated theme in labour courts.

Although at first glance it may seem a simple calculation, as Law 16-92, dated May 29, 1992 (“the Labour Code”) provides the formula to assess the employees’ severance and vested rights, such formula depends on the regular salary received by the employee as compensation for the activity issued in favour of the employer, and the length of the labour relationship.

Dominican law provides that an employment contract exists whenever an individual (employee) consents to render a service under the supervision of another individual or enterprise (employer) in return for a financial benefit, notwithstanding a written contract providing otherwise (labour contracts are defined by the facts that take place in practice, instead of the content of a contract, since it is not mandatory to execute an agreement for a labour relationship to exist). The benefit received by the employee is known as a *salary* or *wage*. Remuneration is the one aspect of labour conditions that has the biggest impact on the day-to-day lives of employees. Hence, it is understandable that there is a high interest from all the parties involved in an employment relationship in comprehending the rules that govern the wages and benefits that the employee shall receive. Moreover, employers and employees should be aware how wages are guaranteed and which benefits would be considered as ordinary salary, so as to calculate severance and vested rights at the end of any employment contract.

The Labour Code regulates the salary and its characteristics. In that regard, the Labour Code provides the minimum conditions under which employees or contractors should perform their jobs, and reflects the compliance with the principles of international labour law that have been ratified by the Dominican government in its capacity as a member of the International Labour Organization. Also, there is a compilation of Rules for the Application of the Labour Code that provides the means to apply the Labour Code.

This chapter is a summary of the characteristics recognised by the labour legislation of the salary (i), and the criteria to determine remuneration as part of the ordinary salary when it is needed to calculate severances and vested rights for the employee (ii). Based on this, we will analyse the decisions of the labour courts, the Supreme Court of Justice and the recently created Constitutional Court, since they should consider that the employees’ rights are protected by the Constitution, and public actions are essential in a State that has the fundamental obligation to ensure the development of its citizens, including employees and employers.

Characteristics

Dominican legislation has provided several rules with respect to wages, and labour courts are entitled

to interpret such rules to the benefit of the employee as a consequence of the principle of favourability set forth by the Labour Code. However, this provision does not imply that such rules are easy to implement. Many companies face difficulties in determining what is expected of them – from the labour perspective – and what can be done to uphold these rules, especially because the law fails to demand that the parties execute a written labour contract. Henceforth, if a written contract is indeed executed, the law merely states that it must indicate the amount of the wage, time, pay period and manner of payment.

The most important rule of all, for employers at least, is the obligation to pay a salary, and to enforce this provision labour legislation has determined that non-payment or delayed payment of salary constitutes a serious fault, penalised with fines, and potentially with the imprisonment of the managers or directors, in the event that the employer is an enterprise.

Under Dominican law, the salary may be paid per hour worked, per work assigned, by commission, by adjustment of the cost of production, or a combination of some or all these methods, and it will depend on the period in which such payment should be made, but these payments should not exceed a time period longer than a month, without any exception. Nevertheless, labour courts have acknowledged that there are collateral benefits payable in periods longer than one month that should be considered when determining the ordinary salary for calculation of severance and vested rights that the employee is entitled to; for instance, quarterly bonuses.

In addition, there is a mandatory part of the wages that has to be paid in money, and only in legal tender/currency, notwithstanding any contrary agreement, but only in so far as minimum wages are concerned. The law also prohibits payment of wages in the form of promissory notes, vouchers or coupons.

This raises the interesting question of whether the common practice of payment by electronic bank transfer or issuance of checks is permitted, especially if it is considered that this method may create indirect costs to the employee, who has to pay the bank for fees related to the financial services it provides. Thus far, labour courts have not addressed this issue, but it is foreseeable that judges could recognise the validity of such payments, if they were widely used and enjoyed the acquiescence of employees, or if they do not prove that this method of payment has caused the employees any harm. This interpretation is not contrary to the international rules of labour law, if it is granted that the method of payment is not imposed on the employee by the employer's preference.

The part of the salary that is regulated by the Labour Code refers to the minimum wage that should be paid to the employees who work for private parties, and which is fixed by the National Salary Committee, depending on the industry in which the service is rendered. However, when the employer has agreed, in recognising terms and conditions that are more favourable to the employee than those considered as minimum rights set forth by the law, this cannot be altered unless there is a variation in the working conditions voluntarily negotiated by the parties. On this last point the Supreme Court of Justice and other labour courts have not been flexible and have had the tendency to protect the employees' rights; as a consequence, in most cases they do not recognise the possibility of changing the employment conditions if they may affect the employee.

On the other hand, to avoid discrimination, employers are legally obligated to pay the same salary to any person for the same work with the same terms of capability, efficiency and seniority, which seeks to avoid wage disparity, especially one based on gender. The aspect related to capacity and efficiency appears to be quite subjective, and there is not a specific legal penalty for the violation of this rule; therefore, it seems that the only consequence of this violation would be that it would open the possibility for the employee to end the employment contract by presenting their resignation for a justified cause, thus giving employees the right to demand payment of severance and vested rights, and to request compensation if they prove that this issue has directly caused any harm. Thus far, labour courts have not addressed this issue.

Another important topic with regard to salary is the protection that the legislature has provided, in the sense that the salary may not be subject to any compensation and cannot be attached or seized by the employee's creditors, with the exception of alimony, or even larger amounts to cover the obligatory assistance of parents over their underage children. Some employers in the Dominican Republic

have adopted policies to guarantee the payment of alimony when there is a judicial decision in that regard. In addition, employees' entitlements for wages, severance and vested rights are guaranteed preferential treatment, and they are considered as privileged creditors over any other kind, apart from the State, the National District and the municipalities. This rule is consistent with the idea that employees' wage claims deserve special protection, since the insolvency of an enterprise and consequently the suspension of payments directly threatens the means of subsistence of employees and their families.

The preferential treatment set forth by the Labour Code was addressed by the Supreme Court of Justice in a decision issued in 2012, in which it was recognised that salary constitutes a constitutional right; therefore the status of undeniability of the Dominican government loses its effect when a person wants to collect such a right. It is important to emphasise that the Labour Code lays down the rule that the salary may not be subject to deductions that are not authorised by law; namely, those relating to mandatory contributions to the Dominican Social Security System, Infotep, taxes, union fees authorised by the employee, pension plans, wage advances made by the employer and those relating to loans granted by banking institutions with the recommendation and guarantee of the employer. The purpose of this provision is to exclude arrangements between the parties that may involve unlawful or abusive deductions, or unsolicited payments in kind to the detriment of the employee's earnings.

Moreover, the Supreme Court of Justice has also recognised that deductions can be made for loans that the employer would conduct, considering that otherwise the employee should not have access to credit from the employer as a lender. Although the court has not cleared the issue, it is understood that to fulfil international standards an upper limit should be placed on deductions, so as to ensure that they are not so onerous as to deprive the employees of the basic minimum income needed for the maintenance of themselves and their families.

The application of these legal provisions regarding salary is supervised by inspectors placed under the authority of the Ministry of Labour, who are empowered to enter freely and without previous warning to the place of work, demand the production of any books, registers or documents prescribed by the labour legislation, and report in writing any failure to comply with statutory requirements, or refer cases directly to the competent judicial authorities.

Determination of ordinary salary

The International Labour Organization defines salary as "remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable by virtue of a written or unwritten contract of employment by an employer to an employed person for work done, or to be done, or for services rendered or to be rendered".

The Dominican legislation follows very closely this definition and, under article 192 of the Labour Code, every payment made in benefit of any employee for the execution of his work must be considered as part of his salary. Also, the law provides that the amount that shall be paid is the one that is indicated in the employment contract.

Nevertheless, taking into consideration the principle of primacy of reality, the Supreme Court of Justice has supported the idea that judges are obligated to analyse and investigate which of all the benefits received by the employees shall be considered as part of their ordinary salary, even when the employment contract reflects a different agreement.

It is important to point out that, in a judgment issued by the Supreme Court of Justice in 2011, it was decided that judges may consider that a benefit or remuneration that was reflected as part of the ordinary salary in a written employment contract was, in reality, of a non-wage nature and that consequently, they are not considered for the purposes of calculating severances and benefits, taking into consideration that the parties had another type of legal relationship. This decision tends not only to protect the parties in the employment contract, but it can also be used by the Tax Authorities when a person's intent to evade fiscal obligations misrepresents the true nature of their affairs.

Based on the definition of salary given by the legislation, it might be thought that it would not constitute a problem to consider every benefit received by an employee in the execution of the employment contract to be part of his ordinary salary, and that all such benefits would be protected by the general rules indicated in the previous section.

However, difficulties arise when identifying the ordinary salary taken as a basis to calculate severance, vested rights and any other employee benefits that may be available during the performance of service or at the termination of the employee's contract, especially because of the labour courts' interpretations which stipulate that specific benefits and allowances are of a non-wage character.

In some cases, the law has been commissioned to clarify the place of work, and has determined that payments received for overtime worked, legal or voluntary tips and Christmas salary are not considered as salary amounts in the calculation of severance.

On the other hand, labour courts do not recognise as part of the computable salary the following: benefits on the company; any annual bonuses or incentives received by employees; travel allowances; expenses reimbursement that is supported by evidence that it is truly a running cost of the service; uniforms; supplies and tools; social security benefits for sickness; and work-related accidents or maternity.

The reason for these criteria is that none of those benefits constitute a real compensation for the employee's service.

Permanent wage is definitely considered to be part of the ordinary salary, and also commissions paid on a regular basis, earned as a result of the employee's normal activities, provided they are produced in the execution of an ordinary work day, even when generated in a period of time longer than a month.

Also considered as part of the regular salary are the following: any payment for performance, under different names such as "incentives", "production bonuses", etc.; fixed amounts for "vehicle maintenance"; food supplies for the employee granted on a permanent basis; vouchers for the cost of living; and rental housing.

Regarding the gas (petrol) allowance, the Supreme Court of Justice considers that it is a part of the ordinary salary if it is paid in a continuous and invariable way, and if there is no evidence that the payment is made to cover an authentic expense generated for the execution of the employment contract.

In conclusion, the Supreme Court of Justice has adopted the idea that any remuneration paid to the employee on a regular basis for his services that is not considered as an authentic expense for the execution of the employment contract, or that is not expressly excluded by the law, shall be a part of the ordinary salary so as to calculate the employees' severance and vested rights.



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