

# **PUERTO RICO LABOR AND EMPLOYMENT LAW PROVISIONS THAT DIFFER SUBSTANTIALLY FROM U.S. LAW**

## **I. INTRODUCTION**

Puerto Rico has been a commonwealth of the United States since 1952. Constitutionally speaking, Puerto Rico remains an unincorporated territory of the United States, but has been allowed by Congress to exercise internal autonomy similar to that of the States of the Union. Consequently, when analyzing Puerto Rico labor laws, it is important to take in consideration any applicable federal laws and regulations as jurisdiction is sometimes shared and in other cases it is exclusive.

Locally, the paramount labor and employment statute is the Constitution of the Commonwealth of Puerto Rico approved in 1952. In Article II Sections 16d, the Constitution affirms the right of employees to choose their occupation, to have a reasonable minimum salary, a regular workday not exceeding eight (8) hours, and to receive additional compensation for work in excess of this daily limit.

## **II. Minimum Wage Act**

The Minimum Wage, Vacation, and Sick Leave Act of Puerto Rico (Minimum Wage Act) was enacted on July 27, 1998. Prior to its enactment, Puerto Rico minimum wage provisions were contained in Law No. 96 of June 26, 1956, as amended by Law No. 84 of July 20, 1995. Even though the Minimum Wage Act repealed Law No. 96, it maintained a “grandfather” clause for non-exempt employees who (1) were hired on or before August 1, 1995, and (2) who were covered by mandatory decrees of the now-extinct Puerto Rico Minimum Wage Board which provided additional or higher benefits than those provided in the Minimum Wage Act. For example, retail employers in Puerto Rico with employees hired prior to August 1, 1995 must honor certain grandfathered rights provided by the applicable Mandatory Decrees.

The Minimum Wage Act establishes that the federal minimum wage fixed by the FLSA applies automatically to non-exempt employees in Puerto Rico who are covered by the FLSA.

### **A. Coverage**

Those enterprises or activities that do not meet the criteria of the FLSA, and are therefore exempt from the federal minimum wage, must pay a minimum wage equal to seventy percent (70%) percent of the prevailing federal minimum wage. However, the Department of Labor of Puerto Rico has the authority to reduce the prevailing percent upon a showing that its implementation would substantially and negatively affect employment in the enterprises covered by this Act. All other FLSA provisions and regulations regarding how the minimum wage is to be paid and which employees and occupations are exempt from the federal minimum wage are applicable in Puerto Rico.

## **B. Exemptions**

Excluded from the provisions of this Act are persons employed as domestic service employees in a family residence, except chauffeurs; persons employed by the Government of the United States of America and the Government of Puerto Rico, so long as they are not instrumentalities that operate as private businesses or enterprises, or Municipal Governments. Independent contractors are expressly excluded from the definition of employee in the Act. Also excluded are “Administrators”, “Executives” and “Professionals” as Regulation Number 13 of the Minimum Wage Board, or the Puerto Rico Secretary of Labor and Human Resources defines such terms. Regulation No. 13 must be interpreted according to the FLSA and regulations contained in the Code of Federal Regulations.

## **C. Vacation Leave**

The Minimum Wage Act provides for a mandatory vacation leave for non-exempt employees. Under this provision, all workers in Puerto Rico employed on or after August 1, 1995, with the exception of those mentioned in Section B, accrue vacation leave at the rate of one and one-fourth ( $1\frac{1}{4}$ ) days for each month in which the employee works at least one hundred and fifteen (115) hours. No leave is accrued for those months in which the employee works less than one hundred and fifteen (115) hours.

The grandfather clause contained in the Minimum Wage Act guarantees that those employees who, as of August 1, 1995, were covered by a mandatory decree that provided for a higher or more beneficial monthly accrual of vacation or vacation accrual, will continue to enjoy their existing benefits.

The Minimum Wage Act clarifies that this provision applies so long as the employee works for the same employer.

Vacation leave is to be accrued based on the regular working day in the month that the accrual occurred. For fluctuating schedules, working days are determined by dividing the total number of regular hours worked by the total number of days worked. When working hours cannot be determined, they should be computed on the basis of eight (8) regular working hours a day.

Vacation leave is to be paid at a rate no less than the hourly wage earned by the non-exempt employee in the month during which the leave was accrued. To compute the hourly wage for those non-exempt employees who earn commissions or other incentives, the commissions or total incentives earned during the year are divided by fifty-two (52) weeks. If a non-exempt employee is hired on a probationary basis and he completes the probationary period, the employee accrues vacation leave from the first day of employment.

A non-exempt employee may not demand vacation leave until completion of one year of employment. Vacation leave should be taken consecutively by the employee and should be granted annually in a manner that will not interfere with normal operations of the enterprise. Notwithstanding the above, through written agreement among the parties, vacation time may be split provided that the employee enjoys at least one (1) vacation leave of five (5) consecutive working days during the year.

Vacation time may be accrued up to a maximum of two (2) years, but if the non-exempt employee is not granted the vacation leave after it has been accumulated for two (2) years, the employer must pay for vacation time in excess of the two(2) year maximum at two (2) times the non-exempt employee's regular rate of pay.

In the event that the non-exempt employee ceases employment, he or she must be paid for all accrued vacation leave, even if the employee has worked less than one year. At the request of the non-exempt employee, the employer may cash out accrued vacation in excess of ten (10) days.

#### **D. Sick Leave**

The Minimum Wage Act also provides for a mandatory sick leave benefit for non-exempt employees. Any non-exempt employee hired on or after August 1, 1995, accrues sick leave at the rate of one (1) day per month for each month in which he works at least one hundred and fifteen (115) hours. No leave is accrued during those months in which the non-exempt employee works less than one hundred and fifteen (115) hours. Sick leave unused at the end of a year is accumulated for successive years, up to a maximum of fifteen (15) days.

Sick leave is to be accrued based on the regular working day in the month that the accrual occurred. For fluctuating schedules, working days are determined by dividing the total number of regular hours worked by the total number of days worked. When hours cannot be determined, they should be computed on the basis of eight (8) regular working hours a day.

Sick leave is to be paid at a rate no less than the hourly wage earned by the non-exempt employee in the month during which the leave was accrued. To compute the hourly wage for those non-exempt employees who earn commissions or other incentives, the commissions or total incentives earned during the year are divided by fifty-two (52) weeks.

If a non-exempt employee is hired under a probationary contract, sick leave will accrue from the beginning of said probationary period. The non-exempt employee has to notify the employer of his/her illness as soon as it is foreseeable that he/she will be absent at the beginning of his/her regular hours of work and no later than the same day of his/her absence. The enjoyment of sick leave does not excuse compliance with those standards of conduct validly established by the employer, such as attendance, punctuality, medical certificates if the absence exceeds two (2) working days, and periodic reports on the continued illness.

## **E. Actions to Recover Wages and Statute of Limitations**

Any employee or worker who receives compensation for his/her work which is less than that prescribed by the Minimum Wage Act or a collective bargaining agreement or an individual work contract, shall be entitled to collect through a civil suit, the difference owed up to the total amount of the corresponding compensation for wages, vacation and sick leave, or any other benefit, plus an amount equal to that which has not been paid to him/her as additional compensation, plus costs, interest, expenses and lawyers' fees, notwithstanding any other agreement to the contrary. All claims that several or all of the workers or employees have in common against an employer for work performed in the same establishment, firm, or site may be joined in a single suit. Claims may be handled by either an ordinary civil proceeding or through any procedure established by other laws. The Minimum Wage Act authorizes the Secretary of Labor to file a claim in court whenever he or she believes that any employer is violating or is going to violate any provision of this Act.

Under the Minimum Wage Act, an employee's suit to recover wages from his/her employer must be brought within a period of three (3) years. This period is counted from the time the employee ceases to work for the employer. The three (3) year limitation period is tolled, and a new term begins, whenever a judicial or administrative claim is filed by the worker, the worker's representative, or an official of the Puerto Rico Department of Labor. The statute of limitations is also tolled by the employer's acknowledgment of the debt.

When the employee is still working for the employer, the claim may only include wages to which the employee is entitled for the three (3) years prior to the date the judicial action is filed. If the employee has ceased employment, the claim only may include wages for the last three years prior to the date of termination.

## **F. Other Matters Related to the Minimum Wage Act**

### *1. Maternity Leave*

#### **a. Prenatal and Post-Partum Leave**

The Working Mother's Protection Act, grants pregnant employees the right to enjoy maternity leave with full pay of four (4) weeks before childbirth and four (4) weeks after childbirth. This right to maternity leave applies to any pregnant employee who is working, enjoying regular vacation or sick leave, or is under any other type of special leave or rest authorized by law while the employment relationship remains in effect. The leave allowed by the WMPA is independent from, and in addition to, any other type of leave to which the pregnant employee may be entitled under other law, for example, the Federal Family and Medical Leave Act of 1993. The pregnant employee may choose to shorten her prenatal leave period to one week before the scheduled date of childbirth and, consequently, extend her post-partum leave to seven weeks. In this case, the employee must provide to the employer a medical certificate evidencing that she is able to work and that there is no risk to her health. The law also provides for an extension of the post-partum leave if the employee gives birth prior to the completion of her prenatal leave, for a period of time equal to that which she failed to enjoy during the prenatal period. When the probable date of childbirth is