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How to Deal with Internal Investigations in Mexico

Compliance and Ethics

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One of the most challenging matters that human resources and legal teams have to deal with is compliance investigations. Even if the company has a sophisticated and experienced audit and compliance department, multinational employers should be aware of local requirements for investigation processes, disciplinary actions, and even employment terminations. This article will identify some of the key points employers must bear in mind while conducting internal investigations in Mexico.

Who will conduct the investigation?

Investigations in Mexico should be conducted by professionals with the proper training and knowledge. Such an individual does not merely know what to ask, how to ask, and where to look for the right answers, but also knows the legal requirements and tight deadlines in which to act on the results of the investigation.

The element of surprise is material as in any other investigation. Employment laws in Mexico provide employees with significant protections, and employees are extremely knowledgeable about their rights and protections. Therefore, the investigator will only have one chance to obtain as much information as possible. Missing this opportunity could complicate the entire investigation and even the disciplinary or termination process.

When allocating the resources for an internal investigation, the lead investigator must have a clear idea of what issues are being investigated and what was the investigated employee(s)'s level of involvement. Before interviewing employees it is important to gather as much information as possible; we encourage deferring actual interviews until later in the investigation process.

Another key issue that supports having outside counsel conduct the investigation is potential bias. Allowing an outside, unbiased investigator conduct the interview can help ensure he or she will concentrate on the facts of the matter rather than on the particular employee involved.

Employee’s interview

As previously mentioned, this is a very critical stage of the process. The investigator must get the employee’s representations in writing and signed. The investigator's notes will not be useful as evidence if the employee is ultimately terminated and/or in the event of litigation. Employees can also deny their initial representations.

If the interview process is recorded or videotaped, employers should first obtain written consent to avoid a potential claim that the employee was not aware that the interview was being recorded. Note that every state in Mexico has a special criminal code, and recording employees without their consent might be considered a criminal offence in some locations.

As in many countries, the employer should not guarantee confidentiality to employees under investigation or to those who participate. However, it is important to obtain an employee's written statement that he or she knows the process, agrees with the investigation process, and agrees to keep the information confidential.

Paid leave during the investigation

A common employer practice in the United States while conducting an internal investigation is to

place the targeted employee on a paid leave of absence. This kind of leave is neither foreseen nor allowed by the Mexican the Federal Labor Law (hereinafter FLL). On the contrary, if an employer separates an employee from his/her job while conducting an internal investigation, the employee could file a complaint for constructive dismissal arguing unilateral change of working conditions or even an unjustified dismissal. If the employee's separation is critical, the employer should provide the employee with vacation days and document such vacation periods with the employee's signature.

Statute of limitations

A challenging legal requirement in Mexico that companies need to analyze when conducting investigations is the short term in which the employer needs to conduct the investigation, make a decision, and take action. The FLL states that an employer has one month to terminate an employee's employment or to discipline him or her, as of the moment the employer becomes aware of the cause of termination or the cause to discipline an employee.

A termination for cause or a sanction applied after the 30-day period will be considered illegal by the labor board.

Termination for cause

The FLL establishes specific causes of termination as well as a precise process for carrying out terminations. Section 47 of the FLL requires the employer to give written notice (the Notice) to the employee when they terminate an individual employment contract, setting out the **precise cause for, and the facts giving rise to, the dismissal**. Specifically, this section states explicitly that the failure to give the Notice to the employee as required is sufficient to make the dismissal unjustified. Therefore, it is essential to correctly prepare and give the Notice in order to justify the dismissal.

Section 185 of the FLL also provides that an employer's lost confidence in a management employee is a reasonable grounds for dismissal. It bears noting, however, that the employer is obliged to substantiate the cause for which it has lost confidence in the management employee. A simple representation that it has lost confidence will not suffice.

As mentioned, the company's right to dismiss an employee without liability expires 30 days following the date on which the employer becomes aware of the statutory grounds for the dismissal. If the investigation has been conducted, or some of the facts—even if uncertain—have been known for longer than 30 days, the employer needs to consider how to address this fact as part of its strategy.

Employees may challenge their dismissal with the labor board within two months of the date it occurs. The employer has the burden of proving, among other matters, the delivery of the Notice to the employee or to the labor board, and that the employee was guilty of any of the conduct described in section 47 of the FLL.

In view of the foregoing, before any decision is taken, it is important to analyze whether the employer is within the legal parameters to discipline or terminate the employee and if all legal requirements have been met.

Disciplinary actions other than termination for cause

According to the FLL, any disciplinary action other than termination has to be included in the employer's internal labor regulations (ILR) or work rules. If the disciplinary action is not included, the action will be considered illegal, entitling the employee to file a complaint for constructive dismissal. The FLL defines work rules or internal labor regulations as the set of mandatory provisions that bind the employer and employees in carrying out the work in an enterprise or establishment. The law provides that the ILR should be developed by an employee-employer joint committee. A copy of the ILR agreed to by the parties must be filed with the appropriate Conciliation and Arbitration Board.

The following forms of disciplinary measures are permissible:

- Oral warning;
- Written warning; and,
- Suspension of up to eight days without wages.

Before a reprimand or suspension may be issued, the employee must have an opportunity to have his or her case heard.

Code of conduct

One of the most common problems that lawyers face while advising multinational companies in Mexico is the enforceability of their Code of Conduct and related policies. Codes of Conduct and policies are not regulated in Mexico; therefore, in order to make them enforceable, the policies and/or codes of conduct need to be included in the ILR. Even when multinational companies prefer to have global policies, it is important to localize them to be enforceable and in accordance with the Mexican legal framework. Furthermore, a presumption of a dual employment relationship or co-employment liability with the employer of record and the parent company should be avoided by having all documents issued by the actual employer of record without reference to the parent company.

Translation of documents

The parties to an employment relationship can decide whether to have versions of an agreement or document in more than one language. Nevertheless, it should be remembered that in the event of actual litigation, the document will have to be in the language of the court hearing the matter. Therefore, when dealing with employees in Mexico, it is recommended that a version of all employment documents be executed in Spanish.

Additional requirements

Where a potential criminal offense might be involved, special attention must be paid to these investigations. The new criminal system created by the recent constitutional amendment requires that all individuals, either employees, internal or external investigators, Mexican or foreign individuals, or any others involved who have knowledge of the potential criminal action render their testimony with criminal authorities.

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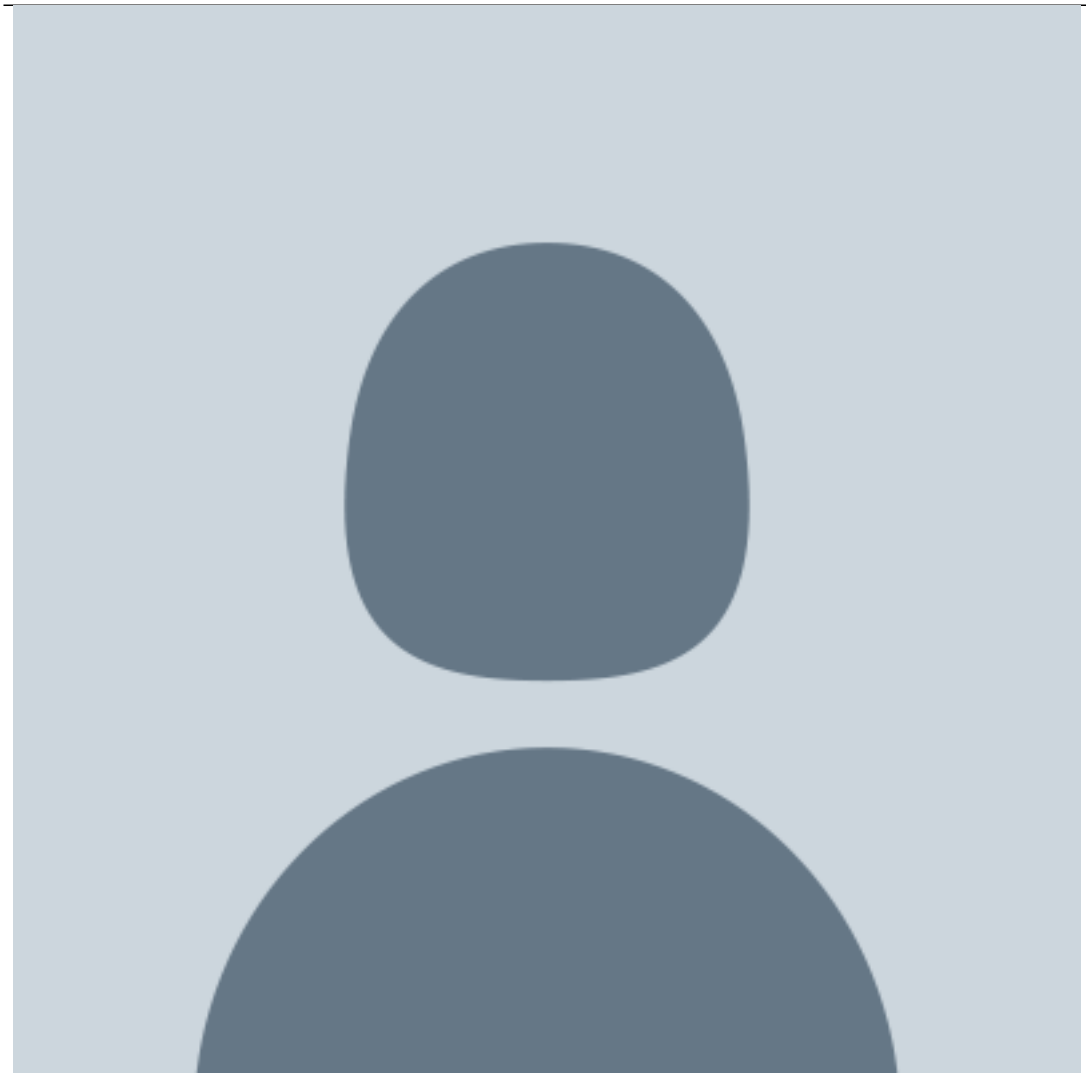

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