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Employment 2021

Puerto Rico
Edwin J. Seda Fernández and Mariel Y. Haack
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

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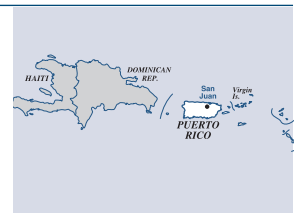
PUERTO RICO

Law and Practice

Contributed by:
Edwin J. Seda Fernández and Mariel Y. Haack
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C. ***see p.22***



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Contributed by: *Edwin J. Seda Fernández and Mariel Y. Haack,*
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

1. INTRODUCTION

1.1 Main Changes in the Past Year

Law No 15

On 21 September 2021, the Governor of Puerto Rico signed into law House Bill 338, to create the Puerto Rico Minimum Wage Act. Among other things, the Puerto Rico Minimum Wage Act amends Puerto Rico's Minimum Wage, Vacation and Sick Leave Act (Law No 180-1998) in order to create a local minimum wage that will prevail over the federal minimum wage provided by the Fair Labor Standards Act, so long as it is greater amount; and creates a Commission to Evaluate the Minimum Wage, ascribed to the Puerto Rico Department of Labor and Human Resources. Most significantly, however, the Act establishes a local minimum wage of USD10.50 per hour, which shall be implemented in successive steps:

- effective 1 January 2022, the local minimum wage will be automatically increased to USD8.50 per hour;
- effective 1 July 2023, the local minimum wage will be automatically increased to USD9.50 per hour; and
- effective 1 July 2024, the local minimum wage will be increased to USD10.50 per hour, unless the Commission to Evaluate the Minimum Wage issues a mandatory decree to the contrary.

This statute applies to all employers in Puerto Rico who are covered by the federal Fair Labor Standards Act, excluding workers in the agriculture industry, and employees of the US federal government, employees of government agencies and instrumentalities, municipalities, as well as employees of the legislative branches of the government of the Commonwealth of Puerto Rico. The Act also excludes employees covered by a collective bargaining agreement between a union and their employer, so long as such agreement provides equal or superior benefits. The Act shall not apply to employees classified as "administrators", "professionals", or "executives" under Puerto Rico Regulation No 13 regarding white-collar exemptions.

This law entered into effect immediately after its enactment.

On 30 July 2021, the government of Puerto Rico enacted Law 15 to extend workplace protections to employees who are registered and authorised users of cannabis for medical reasons. The use of cannabis for medical reasons has been legal since 2017 pursuant to Law No 42-2017. However, Law No 42-2017 failed to address the impact of medical marijuana in the workplace. As a result, and since marijuana is still an illegal substance under US federal law, many employees who were registered patients participating in a bona fide state-regulated medical marijuana programme faced adverse employment consequences, including termination, when they self-identified as medical marijuana users or were screened for controlled substances. Past attempts to correct this incongruence had failed in the Puerto Rico legislature.

However, Law 15 finally addresses the issue and sets forth that being registered as a patient who is approved for the use of medical cannabis under Puerto Rico's state-regulated medical cannabis programme shall be a protected classification, and that a person who self-identified as such to an employer cannot be discriminated against in the process of recruitment, hiring, promotion, termination, or any other term or condition of employment. It further sets forth that no employer shall be denied contracts, licences, permits, certifications, benefits, or funds under the laws of the Commonwealth of Puerto Rico for the sole reason of having registered and authorised users of medical marijuana on their payroll.

For an in-depth review of this legislation and its ramifications, please see the Puerto Rico Trends and Developments chapter in this guide.

In addition, there have been significant developments resulting from the COVID-19 pandemic, which are discussed in **1.2 COVID-19 Crisis**.

1.2 COVID-19 Crisis

Puerto Rico is still under a state of emergency declared on 12 March 2020 due to the COVID-19 pandemic. The local government has implemented a variety of measures, both temporary and permanent, to address the situation.

COVID-19 Leave

One of the first measures implemented in connection with the COVID-19 pandemic was to allow hourly employees to exhaust accrued paid leave (including sick leave and vacation) while they were without work due to lockdown orders, so as to minimise the economic impact of the lockdown on individuals forced to stay at home. This measure was only for the duration of the local stay-at-home orders. Employers have also been directed to adopt flexible leave policies consistent with public health guidance and have been required to liberally grant requests for remote working arrangements, work schedule adjustments, and other forms of reasonable accommodation related to COVID-19. Remote working has been strongly encouraged for employees who are able to do so. In addition, employers who furlough or reduce the regular working hours of any employee in connection with the COVID-19 emergency are obliged to notify them in writing of this fact and advise them of their eligibility for unemployment benefits.

In addition, on 9 April 2020, the Governor of Puerto Rico signed into law Act No 37, a permanent amendment to Article 6 of Puerto Rico's Minimum Wage, Vacation and Sick Leave Act (Law No 180-1998), which provides an additional five days of paid leave for any employee who becomes infected, is suspected of being infected, or is exposed to any disease for which the Governor or the Secretary of Health has declared a state of emergency. This leave is available after all other paid leave has been exhausted.

COVID-19 Workplace Protocol

All employers doing business in Puerto Rico are currently required to have a COVID-19 Workplace Protocol in place which complies with guidance issued by the Puerto Rico Department of Labour and Human Resources and the Puerto Rico Occupational Safety and Health Administration (PR-OSHA). The workplace protocol must be contained in a written document, unique to the workplace, taking into consideration the specific tasks carried out there, the physical structure of the workplace, and the workforce specific to that location.

The protocol should include general information regarding COVID-19 (definition, manner of transmission, symptoms, etc) and recommendations issued by local, state, national and international health bodies to avoid transmission of COVID-19. The protocol should also describe the process for monitoring and screening employees before they enter the workplace, and the protocols to follow if an employee exhibits symptoms of or tests positive for COVID-19. It should also explain social distancing measures (for example, increased distance between work stations or staggered shifts); as well as those for maintaining proper hygiene (such as routine disinfecting of work areas, use of hand sanitiser, and hand washing); and indicate the type of personal protective equipment deemed necessary for the employees, and that shall be provided, free of cost, by the employer.

Mask Wearing and Vaccine Mandates

Presently, all persons must wear a mask or facial covering to cover their nose and mouth

in enclosed spaces, regardless of vaccination status. The enforcement of the mask mandate is expected to remain in place until the pandemic is brought under control. Accordingly, employers should have masks available for employees who are required to be present in the workplace. All employers must have a designated official to continuously evaluate and monitor the workplace and identify new risks and needs related to the COVID-19 pandemic. Furthermore, vaccination mandates are also currently in force for various industries.

Pursuant to Governor Pierluisi's Executive Order 2021-058, dated 28 July 2021, all government employees are required to have received their first dose of the vaccine on or before 16 August 2021, and their second dose (if they receive any of the vaccines requiring more than one dose) on or before 30 September 2021. Subsequently, on 5 August and 11 August 2021, the Governor issued Executive Orders, 2021-062 and 2021-063, which extend these vaccination requirements to government contractors, employees in the healthcare industry, as well as employees in the hospitality and tourism industry, including hotels, inns, short-term rentals and other lodging. Concessionaries and other businesses who operate in the vicinity of these types of establishments have been encouraged to adopt this requirement. Employees covered by this Executive Order must be fully vaccinated by 30 September 2021.

Executive Order 2021-063, which goes into effect on 23 August 2021, extends the COVID-19 vaccine mandate to all restaurants, bars, cafeterias, theatres, cinemas, coliseums, event venues, as well as any other establishment that serves food or beverages (even if it is not their primary business). Employees of these establishments must present evidence that they have received at least one dose of the vaccine on or before 23 August 2021, and the second dose no later than 7 October 2021.

On 19 August 2021, Governor Pierluisi issued Executive Order 2021-064, which further extends local vaccine mandates to include employees of gymnasiums, beauty salons, barber shops, spas, childcare centres, casinos, supermarkets, grocery stores and gas stations. These employees must show proof of their first dose of the vaccine on or before 30 August 2021, and of their second dose no later than 15 October 2021.

Exceptions

There are only limited exceptions to the newly-enacted vaccine mandates:

- medical reasons;
- sincerely-held religious beliefs; or
- evidence of having recovered from COVID-19 within the last three months, together with a medical certification that that the employee is no longer contagious and does not present a risk of virus transmission.

Employees who are unable or refuse to get vaccinated under one of the permitted exceptions to the Executive Orders must present a negative COVID-19 test weekly. Employees who fail to comply may not present themselves to work and must be placed on leave (paid or unpaid, depending on the employer's policies). Moreover, all patrons of establishments covered by these Executive Orders must present evidence of COVID-19 vaccination; a negative COVID-19 test performed no more than 72 hours prior to presenting themselves to the venue; or evidence that they have recovered from a COVID-19 infection within the last three months and are no longer contagious. Establishments who do not comply with the above may be subject to civil and criminal penalties. These measures will remain in place until the state of emergency is lifted.

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Employers and private establishments not covered by the current vaccine mandates may require their employees to be vaccinated against COVID-19 and present proof of vaccination before returning to work. Employers and private establishments, including those covered by the vaccine mandates, are also free to implement more restrictive measures than those described above for both their employees and patrons.

Puerto Rico employers are also subject to all federal legislation related to COVID-19, as well as related guidance from the US Department of Labour, the Centres for Disease Control, and the US Occupational Safety and Health Administration.

2. TERMS OF EMPLOYMENT

2.1 Status of Employee

White-Collar Employees

As Puerto Rico is subject to US federal law, to qualify as an exempt or "white-collar" employee, an employee must meet the requirements of the Fair Labor Standards Act (FLSA). Since Puerto Rico was exempted from the 1 January 2020 increase of the FLSA salary basis, an exempt employee must earn a minimum salary of USD455 per week, or USD23,660 per year. The employee's compensation must not be subject to reduction because of variations in the quality or quantity of work performed. The employee's duties must also satisfy a "duties test" to determine if they qualify as a bona fide executive, administrator, professional or outside salesperson.

Employees classified as exempt or white-collar are not entitled to overtime pay. The terms and conditions of compensation for exempt employees are typically governed by contractual agreement between the employer and the employee, rather than being statutorily established, as in the case of rank-and-file employees. Parties may negotiate a broad variety of compensation and benefits, such as, for example, health, stock options, incentive plans, tax equalisation, other deferred compensation and bonuses. In line with the white-collar exemptions of the FLSA, Puerto Rico also adopted Regulation No 13 (2005), which virtually incorporated the same tests and definitions to determine exempt status.

Blue-Collar Employees

By contrast, non-exempt or "blue-collar" employees are non-management personnel who have a right to overtime pay and meal periods, as well as a host of other statutory entitlements and protections under both federal and Puerto Rico law. Consequently, there is less flexibility to negotiate their terms and conditions of employment.

2.2 Contractual Relationship

The Labour Reform Act of 2017 (Law No 4-2017) amended most of the major employment laws that apply to private-sector employees. Employees retained prior to the enactment of the law are grandfathered, according to certain specific provisions of the law. Accordingly, the changes mainly affect employees hired after the law was passed.

Definite/Indefinite Employment

In Puerto Rico, parties are free to negotiate any employment contracts they deem appropriate, so long as the arrangement is not contrary to the law, social mores or public policy. Employers may retain full-time, part-time, indefinite and temporary employees, among others.

Pursuant to Law No 80 of May 30, 1976 (Law No 80), a temporary employee is one who is retained:

- for a specific project or endeavour;

- to substitute for an employee during a leave of absence; or
- to perform extraordinary duties or those of a short duration (eg, annual inventory, equipment repairs, or loading or unloading of cargo).

Fixed-term employees are those who are retained for a specific project or a specific period. An employee will be deemed to be a bona fide fixed-term employee if the employment relationship lasts for no more than three years, including any renewals of the contract. That being said, exempt employees may contractually agree to be deemed fixed-term even if the total period of employment exceeds three years. Employers may also retain the services of independent contractors.

Employment Agreements

Employment agreements can be verbal. While written contracts have never been required for employees hired for an indefinite period, after the enactment of the Labour Reform Act, contracts for fixed-term and temporary employees can also be verbal. However, it is strongly recommended that these types of agreements be committed to writing, as there is typically a strong presumption that an employee has been retained for an indefinite period, and the employer bears the burden of proving otherwise.

All non-exempt employees are presumed to have an automatic nine-month probationary period. Exempt employees are presumed to have an automatic twelve-month probationary period. Shorter probationary periods can be negotiated. There is no need for the probationary contract to be in writing, although it is recommended that probationary periods that are different from those set forth by law be documented.

Foreign Workers

Finally, an employer may assign employees from other jurisdictions to work in Puerto Rico for less than three years without having them deemed Puerto Rico employees, as long as they maintain an employment relationship with their foreign employer. In such cases, the legal and contractual rights and obligations shall be interpreted in accordance with the original employment agreement, including choice of law. However, the employee will still be subject to Puerto Rico law for the purposes of income tax, discrimination laws, and workplace accidents or illnesses. If no choice of law is made in the employment agreement, Puerto Rico law will apply.

2.3 Working Hours

According to Puerto Rico Act Number 379 of 15 May 1948 (Law No 379), which covers non-exempt (hourly) employees, eight hours of work constitutes a regular working day in Puerto Rico and 40 hours of work constitutes a workweek. Working hours exceeding these minimums must be compensated as overtime.

Overtime

In general, extra hours are those hours that an employee works for their employer in excess of eight hours during the calendar day, in excess of 40 hours during any week, during a day when the establishment should remain closed to the public by law or in excess of the maximum number of working hours a day fixed in a collective bargaining agreement.

Since the enactment of the Labour Reform Act, employees who are required to perform overtime work must be compensated for each extra hour a wage rate equal to at least time and a half or double the agreed rate for regular hours. If the employer's industry is covered by the provisions of the FLSA, the employer will be required to pay employees for extra hours at a wage rate of no less than time and a half of the rate agreed

upon for regular hours for both daily and weekly overtime, except when other standards are fixed by a mandatory decree or a collective bargaining agreement. However, employees hired prior to the law's enactment will preserve any superior benefits they enjoyed before its passing, including overtime at a rate of twice their regular pay.

Flexitime

Voluntary flexible work schedules of no more than ten regular hours a day in a period of four days in a workweek are also permitted, without incurring overtime liability. Any flexible work schedule arrangement can be revoked by mutual agreement of the parties, or unilaterally after one year. Employees may request flexibility as to the place of employment and working hours, and the employer is obliged to respond and/or provide alternatives to the employee's request within 20 days.

Likewise, employers can allow employees to replace hours not worked for personal reasons during the workweek. These hours will not be considered overtime if they are replaced during the same workweek as the absence, and do not exceed 12 hours in a day, or 40 hours in a week.

Meal Periods

Law No 379 also provides meal periods for non-exempt employees. A meal period consists of one hour but can be reduced to 30 minutes by mutual agreement in writing between the employer and the employee. The meal period for croupiers, nurses, and security guards, can be further reduced to 20 minutes. Meal periods should commence not before the conclusion of the third, nor after the commencement of the sixth, consecutive hour of work. Employees cannot be required to work more than five consecutive hours without pausing to eat. As an exception, the Secretary of Labour and Human Resources may authorise that the meal period be enjoyed between the second and the third consecutive hour of work.

The meal period shall be paid at a rate of one and a half times the base rate of pay. The meal period can be waived if the total number of hours worked does not exceed six hours in a day. Certain other provisions apply to meal periods after regular hours of work.

Day of Rest

Puerto Rico Law Number 289 of 9 April 1946 (Law No 289) provides that all non-exempt employees shall have the right to one day of rest for every six working days. Employers are prohibited from deducting from the salary of any employee the day of rest. If the employer requests employees to work on their day of rest, it is obliged to pay those employees for the hours worked on the day of rest at a rate of time and a half the wage rate agreed upon for regular working hours.

Administrators, executives, and professionals, as well as other employees or industries not covered by the FLSA or Law No 379, as amended by Law No 4, are not covered by this law.

In addition, since Law No 4 was enacted, employers are no longer required to pay employees a minimum of USD11.50 per hour for working on Sundays. However, commercial establishments that, prior to Law No 4, were required to remain closed during Good Friday and Easter must still remain closed.

2.4 Compensation

Minimum Wage

Puerto Rico's Minimum Wage, Vacation and Sick Leave Act, Law No 180 of 27 July 1998 (Law No 180), which covers non-exempt employees, provides that the federal minimum wage law (currently USD7.25 per hour), automatically applies to all employers in Puerto Rico covered by the FLSA. Effective 1 January 2022, the local mini-

mum wage will increase to USD8.50 per hour, as discussed in **1.1 Main Changes in the Past Year**. Employers who are not covered by the FLSA must pay their employees at least 70% of the prevailing federal minimum wage. However, employees who have a higher salary pursuant to a mandatory decree issued by the Puerto Rico Department of Labour and Human Resources shall receive the rate of pay established therein, notwithstanding Law No 180 or the FLSA. As discussed in **2.1 Status of Employee**, the minimum wage for exempt employees in Puerto Rico is USD455 per week.

Any employee who is actively working for their employer, but is compelled to file a claim for unpaid wages, can only claim for wages owed within the three years preceding the date the action is filed. If the employee has ceased working for the employer, the claim is limited to the three years prior to the date of termination.

Employers who violate statutory wage obligations are subject to fines and penalties. The Office of Mediation and Adjudication of the Puerto Rico Department of Labour and Human Resources has jurisdiction to entertain salary claims under Law No 180.

It is worth noting that on 19 May 2021, the Governor of Puerto Rico created an Advisory Board on the Minimum Wage, tasked with evaluating the local minimum wage as it relates to current cost of living on the island, and rendering a report with their recommendations within 90 days. There is also legislation under consideration in both chambers of the Puerto Rico legislature which would increase the minimum wage in Puerto Rico above the current federal minimum under the FLSA.

PROMESA

Since 30 June 2016, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), has amended the FLSA to allow the Puerto Rico Governor, with the approval of the Oversight Board, to set a minimum wage of no less than USD4.25 an hour for workers under the age of 25 who first became employed after the enactment of the Act, for a period of four years, or until the termination of the Oversight Board, whichever occurs first. Employers are prohibited from terminating current employees for the purpose of hiring individuals at the reduced hourly rate. Any employer engaging in such conduct will be deemed to have violated the non-retaliation provisions included in the FLSA.

However, based on the Governor's 19 May 2021 Executive Order and the pending legislation in the Legislative Assembly of Puerto Rico, discussed above, there appears to be little appetite to implement a wage reduction of this nature.

Status of Labour Reform

In addition to the pending legislation to address the local minimum wage, there are currently several projects under consideration to modify the changes implemented under the Labour Reform Act to "restore" employees' rights. At least two of the projects aim to fully repeal the statute, while others propose specific modifications to the law, including:

- less burdensome requirements for accrual of vacation leave;
- longer tolling periods for employment-related claims;
- shorter probationary periods;
- a more beneficial statutory severance formula in wrongful discharge cases (including reinstatement as a remedy, which has never been available under Puerto Rico law); and
- extending employment reservation in case of work-related accidents or illnesses from 12–24 months.

Although Governor Pierluisi has indicated that these matters will be addressed as part of his administration's public policy, the ultimate form of such legislation remains to be seen.

Bonuses

Pursuant to Law Number 148 of 30 June 1969 (Law No 148), Puerto Rico also provides for a Christmas bonus to employees who work 1,350 hours between October 1st and September 30th of the bonus year. For employees retained before the enactment of Law No 4, the minimum number of hours worked to be eligible for the bonus is 700 hours between October 1st and September 30th of the bonus year. The bonus must be paid between November 15th and December 15th.

Employers who employ more than 20 employees within a 26-week period between October 1st and September 30th of the following year will pay a Christmas bonus of 2% of the salaries earned with a cap of USD600, while employers who employ fewer than 20 employees during the relevant period will pay a bonus of USD300. Newly hired employees will be entitled to 50% of the bonus during the first year of employment.

Forms of Payment

Under Puerto Rico Law Number 17 of 17 April 1931 (Law No 17), as amended, employers may effect payment of salaries to non-exempt employees in the form of cash, cheques, direct deposits, electronic transfers or payroll credit cards to each employee's bank account, in payroll intervals not to exceed 15 days. Employers must obtain the employee's prior voluntary written authorisation to make payments in direct deposit or electronic transfer transactions. When payment of wages is made by direct deposit or electronic transfer, each employee must receive a pay slip from the employer acknowledging that the payment has been deposited in the employee's bank account and the date of the deposit. The deposit must be available to employees on their regular pay day. Salary payments can also be made to the employee at the workplace or can be paid in commercial establishments belonging to the employer. Exempt employees are not subject to this statute.

An employer that in any way affects the employment of an individual because the employee does not authorise the payment of salaries by direct deposit or electronic transfer shall be subject to fines and penalties. Employees are also permitted to file a complaint with the Secretary of Labour and Human Resources requesting the posting of a bond by the employer if it makes payments with cheques drawn against insufficient funds, or if the employer's bank account has been closed.

Deductions

Employers are not allowed to make any payroll deductions from the employee's wages without the employee's written authorisation. Deductions are limited to the following purposes:

- a bona fide medical insurance plan;
- the purchase of savings bonds issued by the government of the United States of America or by the government of the Commonwealth of Puerto Rico;
- the purchase of shares of stock or payment of loans and interest or other debts the employee may have with any credit union of Puerto Rico;
- payments towards a pension, Individual Retirement Account (IRA), savings, retirement or insurance plan;
- when the employer advances any amount of money to the employee, the employer may deduct that sum from the salary of the employee which corresponds to the week in which the advance was made;
- contributions to qualified charitable institutions of Puerto Rico;

- contributions of employees to any plan subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA); and
- contributions or payments for any insurance plan or policy or savings, retirement, pension or any combination of such plans.

2.5 Other Terms of Employment

Vacation and Medical Leave

In general, all non-exempt employees are required to work 130 hours to accrue vacation and sick leave. Employees retained after the enactment of Law No 4 will accrue a minimum of half a day's vacation leave per month during the first year of employment; three quarters of a day's vacation leave from the second to the fifth year of employment; one day per month from the sixth to the 15th year of employment, and one and a quarter days of vacation leave after the 15th year of employment. Sick leave is accrued at a rate of one day per month, regardless of years of service. Employees retained prior to the enactment of the Labour Reform Act continue to accrue one and a quarter days of vacation leave and one day of medical leave per month, for each month in which the employee works at least 130 hours, regardless of years of service. Law No 180 has numerous requirements that regulate the use of vacation and sick leave. Certain mandatory decrees, which are still in effect, could provide for greater or lesser vacation and sick leave benefits. Employers may provide greater benefits if they so desire. However, it is illegal for employers to terminate and rehire or substitute current employees in order to provide inferior benefits based on the Labour Reform Act's amendments to Law No 180.

Puerto Rico law allows employees to use up to five days of accrued medical leave in connection with the illness or medical treatment of a child, parent, spouse, person of advanced age or with a disability, or under the employee's custody or tutelage. In addition, subject to certain requirements, public and private sector employees who suffer any of the following catastrophic illnesses can receive up to six additional paid days off per year: AIDS, tuberculosis, leprosy, lupus, cystic fibrosis, cancer, haemophilia, aplastic anaemia, rheumatoid arthritis, autism, post-organ transplant complications, scleroderma, multiple sclerosis, amyotrophic lateral sclerosis (ALS) and chronic renal disease (stages three, four and five).

It is important to note that Law No 180, as amended, prohibits employers from using justified medical absences as efficiency criteria in an employee's yearly performance evaluation. Under the law, employees are entitled to use their sick leave in such cases as is necessary and warranted. Therefore, it is a violation of that right for employers to establish an internal policy which allows them to treat justified medical absences in the same manner as unjustified or irresponsible absences, creating a negative impression of the employee when they are considered for a pay increase, a promotion, or other job-related benefits. An employer may not consider the justified use of medical leave as an unfavourable factor in an employee's performance evaluation or take adverse action against employees for taking leave, such as reducing their work hours, reclassifying their position, or changing their shifts or schedule.

Exempt employees are not covered under Law No 180. Accordingly, the terms of their vacation and medical leave are contractually negotiated or established by employer policy.

Maternity Leave and Working Mothers

Maternity is perhaps the most protected condition covered by Puerto Rico labour laws. Under Puerto Rico Law Number 3 of March 13, 1942 (Law No 3), all female employees who give birth or adopt a child under the age of five are enti-

tled to receive 100% of their salary during the statutory eight-week maternity leave. Law No 3 applies to all employees, exempt and non-exempt. The Puerto Rico Department of Labour and Human Resources has issued regulations regarding statutory maternity leave.

Furthermore, a pregnant employee cannot be penalised for any decrease in her productivity. If discrimination is found, the prevailing employee may be awarded back pay, front pay, emotional and compensatory damages, attorney's fees and/or reinstatement. Any award of damages must be doubled.

Finally, Puerto Rico Law No 427 of 16 December 2000 (Law No 427), requires a safe, private, and hygienic space for employees who are nursing or extracting breast milk. Breastfeeding mothers are entitled to a break of one hour for each working day, which may be divided into two 30-minute or three 20-minute breaks, for up to one year after the employee's return from maternity leave. Mothers who work part-time, but for more than four hours a day, are entitled to a period of 20 minutes to nurse or extract breast milk. Employers who fail to comply are subject to a penalty of USD3,000.

Disability and Accidents

Puerto Rico Law No 44 of 2 July 1985, (Law No 44), was enacted a few years before the Americans with Disabilities Act (ADA) and was later amended to further align with it. Under the statute, both public and private institutions are prohibited from discriminating against persons with physical or mental disabilities. This prohibition extends to recruitment, compensation, fringe benefits, reasonable accommodation and access facilities, seniority, participation in training programmes, promotions or any other term or condition of employment.

Another local counterpart of the ADA, Law No 81 of 27 July 1996, focuses on the implementation of reasonable accommodation measures. Violations will result in fines and other remedies.

Puerto Rico's Short Term Non-Occupational Disability Law, Law No 139 of 26 June 1968 (Law No 139, or SINOT from its initials in Spanish), provides up to one year of leave with reservation of employment for temporary disability not connected with employment, as well as certain weekly payments for up to six months. Employees can be insured through the Puerto Rico Department of Labour, through a private insurance company, or can be self-insured. Furthermore, local law provides that leave may be a form of reasonable accommodation.

As to work-related disability, Puerto Rico's Workmen's Accident Compensation Law, Law No 45 of 18 April 1935 (Law No 45), provides up to twelve months of leave with reservation of employment for work-related accidents or conditions. All employees must be insured for work-related accidents through the State Insurance Fund, a state monopoly created for this purpose. Failure to insure employees or late payment of the insurance premiums can result in stiff penalties. However, an insured employer will have immunity against lawsuits for work-related accidents.

For employers with 15 employees or fewer at the time of accident or disability, the employment reservation provided by Law No 45 and Law No 139 is six months.

Puerto Rico also creates statutory protection for individuals involved in automobile accidents. The Administration for Compensation for Automobile Accidents (ACAA), a Puerto Rico public corporation, is charged with providing health services and employment reservation for victims of automobile accidents. The period of

employment reservation under the ACAA is six months. In addition, Puerto Rico law provides, under specific circumstances, statutory leave for employees summoned as witnesses in criminal cases, serving as jurors, receiving treatment for substance abuse, and participating in sports-related activities.

The Family and Medical Leave Act (FMLA) applies in Puerto Rico just as in any other US state.

Religion

Employers in Puerto Rico also have an obligation to accommodate the religious practices of their employees. While this is not a source of statutory leave, employers are required to reach agreements with their employees to provide accommodations that reasonably allow them to observe their religious practices, so long as it is not unduly burdensome to do so. If the religious accommodation includes any period of leave, such leave need not be compensated.

Confidentiality and Non-disparagement

In general, there are no restrictions on well-crafted confidentiality and non-disparagement policies in Puerto Rico. However, Puerto Rico is subject to the same restrictions and limitations imposed by agencies such as the National Labour Relations Board (NLRB) to regulate employee comments on social media.

3. RESTRICTIVE COVENANTS

3.1 Non-competition Clauses

Covenants not to compete are generally enforceable in Puerto Rico, subject to certain requirements. In fact, since the enactment of the Labour Reform Act, all employees have a duty of loyalty and must refrain from competing with the business activities of their employer during the course of their employment, even in the absence of a non-competition agreement.

However, non-competition agreements must be consistent with public policy. The Puerto Rico Constitution and the case law of the Puerto Rico Supreme Court establish the right of every employee to choose – and resign freely from – their employment. In the absence of a valid non-competition agreement, or an employment contract for a fixed period, any employee is free to resign and work for any other employer, including a competitor.

For a covenant not to compete to be valid in Puerto Rico, it must be made in writing, in exchange for adequate consideration, and must not impose an undue burden on the employee. The non-competition clause must be tailored to the employer's legitimate need to protect its business in terms of duration, geographic limitation, and clients affected. Typically, a non-competition agreement must not exceed twelve months, although longer periods have been found valid for shareholders and consultants. Generally, the more parity that exists between the negotiating parties, the more likely it is that the agreement will be deemed valid.

If the non-competition clause is part of the original employment agreement, no independent consideration is required. However, if the clause is added after the individual has become employed, adequate consideration must be provided. What constitutes "adequate" consideration varies by industry, position, and by the employee's overall compensation package.

3.2 Non-solicitation Clauses – Enforceability/Standards

Under general freedom of contract principles, non-solicitation of employee provisions are typically valid. Such provisions are generally includ-

ed in non-competition agreements, separation agreements and settlement agreements.

4. DATA PRIVACY LAW

4.1 General Overview

There is no data protection authority or overarching law that governs information privacy in Puerto Rico; only a Citizens Advice Bureau on Information Privacy Protection within the Puerto Rico Department of Consumer Affairs (DACO from its Spanish initials), the duties and responsibilities of which are primarily advisory. Accordingly, Puerto Rico's privacy regime is limited in scope as it lacks a uniform rule of law or structure to protect individuals' privacy concerns. Nonetheless, the following laws relating to data privacy could also have an impact on the employment relationship:

- Law Number 111 of 7 September 2005, Sections 4051 et seq (Citizen Information of Data Banks Security Act or CIDBSA);
- Law Number 39 of 24 January 2012, Sections 4061 et seq (Notification of Privacy Policies Act or NPPA); and
- Law Number 234 of 19 December 2014, Sections 4181 et seq (Consumer Personal Information Destruction Act or CPIDA).

5. FOREIGN WORKERS

5.1 Limitations on the Use of Foreign Workers

Employment of foreign workers in Puerto Rico is governed by US immigration law. See **2.2 Contractual Relationship (Foreign Workers)** for discussion of the legal and contractual rights and obligations of such workers in Puerto Rico.

5.2 Registration Requirements

All foreign employees are subject to the registration requirements of US immigration law.

6. COLLECTIVE RELATIONS

6.1 Status/Role of Unions

Puerto Rico employees in the private sector can obtain union representation pursuant to the provisions of the US National Labor Relations Act (NLRA) and the procedures of the NLRB. Employers in the airline industry are regulated by the Railway Labor Act (RLA), a US statute that covers employees in the air transportation and railway industries. Employers in the private sector, usually small employers that fall outside the scope of the NLRA, and public corporations that do business as private corporations, such as public utilities, are covered by the Puerto Rico Labour Relations Act, a statute which resembles the NLRA.

Under the NLRA, employees can organise or join a union to negotiate (with their employer) matters pertaining to wages, hours, and other terms and conditions of employment. They can also discuss matters related to union organisation and working conditions with co-workers. Moreover, employees can engage in concerted action which can include strikes and pickets, depending on the purposes of such activities. Employees have a right to union representation at investigatory interviews, as well as a right to union representation during disciplinary procedures and arbitration.

The percentage of union representation in the private sector in Puerto Rico is in single digits. Certain industries have traditionally been organised – such as the maritime industry, hotels, casinos, transportation, and hospitals – but,

even in those strongholds, union representation has continued to decline.

The most active and combative union representation is presently limited to government-sponsored corporations such as the Puerto Rico Aqueduct and Sewer Authority, the State Insurance Fund, certain state-sponsored medical facilities, and public transportation.

The framework and requirements for union elections in the private sector are provided by the NLRB rules and regulations, just as in any other US state or territory.

6.2 Employee Representative Bodies

Please refer to **6.1 Status/Role of Unions**.

6.3 Collective Bargaining Agreements

Please refer to **6.1 Status/Role of Unions**.

Employers with unions must comply with the requirements of the applicable collective bargaining agreement, specifically the grievance and arbitration procedures, prior to implementing terminations.

7. TERMINATION OF EMPLOYMENT

7.1 Grounds for Termination

Just cause for termination is required in Puerto Rico. Law No 80 of 30 May 1976 (Law No 80), which covers employees hired for an indefinite period, states that good cause for the discharge of an employee from an establishment is understood to be one of the following.

- That the worker indulges in a pattern of improper or disorderly conduct.
- That the employee continues in a pattern of deficient, inefficient, unsatisfactory, poor, tardy or negligent performance; this includes non-compliance with the employer's quality and safety standards, low productivity, lack of competence or ability to perform the work at reasonable levels as required by the employer and repeated complaints from the employer's customers.
- The employee's repeated violations of the reasonable rules and regulations established for the operation of the establishment, provided a written copy thereof has been provided to the employee in good time.
- The full, temporary, or partial closing of the operations of the establishment, provided that in those cases in which the company has more than one office, factory, branch, or plant, the full, temporary, or partial closing of operations of any of these establishments shall constitute just cause for discharge under the law.
- Technological or organisational changes, as well as changes of style, design, or the nature of the product made or handled by the establishment and/or changes in the services rendered to the public.
- Reductions in employment made necessary by a reduction in the anticipated or prevailing volume of production, sales, or profits at the time of the discharge, or for the purpose of increasing the productivity or competitiveness of the establishment.

This list is not exhaustive, as just cause refers to any reason related to the proper and normal operation of the establishment.

Wrongful Discharge Compensation

Law No 80 provides a formula for statutory indemnity in cases of wrongful discharge. For employees retained after 26 January 2017, the formula for such indemnity is three months of salary, plus two weeks for every completed year of service, capped to a maximum of nine months of salary. This formula does not apply to employees hired prior to the enactment of Law No 4,

who would still be entitled to claim under the prior, more beneficial indemnity formula.

For employees retained prior to the enactment of Law No 4, statutory severance is calculated as follows:

- two months' salary, if the termination occurs within the first five years of service;
- three months' salary, if the termination occurs after five years and before 15 years of service; or
- six months' salary, if the termination occurs after 15 years of service.

In addition, a wrongfully terminated employee retained prior to the enactment of the Labour Reform Act would be entitled to a progressive indemnity equivalent to one week for each year of service if the discharge occurred within the first five years; two weeks for each year of completed service if the discharge occurred after five years, and until 15 years; and three weeks for each year of completed service if the discharge occurred after 15 years.

The indemnity shall be calculated based on the highest rate of salary earned by the employee during the three years immediately preceding their discharge. Law No 4 clarifies that the term "basic salary" excludes certain benefits such as deferred compensation, income from tips that surpasses the federal minimum wage, and disability payments. Furthermore, the computation shall be based on the highest number of regular working hours of the employee during any period of 30 consecutive calendar days within the year immediately preceding the discharge. No payroll deductions, except for social security, shall be made on such an indemnity. As of the enactment of Law No 4, payments under Law No 80 are tax exempt.

The Puerto Rico Department of Labour and Human Resources has issued extensive guidelines regarding the interpretation of Law No 80.

Potential Repeal of Law 80

There has been ongoing discussion regarding the derogation of Law No 80 in the context of the negotiations between the government of the Commonwealth of Puerto Rico and the Fiscal Oversight Board established by PROMESA. The Fiscal Oversight Board is strongly in favour of eliminating Law No 80 and making Puerto Rico an "at-will" jurisdiction, arguing that this will incentivise hiring and, consequently, stimulate the economy. However, this position has been met with intense resistance from local congress, which has now voted against repealing the statute twice. As discussed in **2.4 Compensation**, there are several measures under consideration which would undo the severance caps implemented under the Labour Reform Act in favour of a more generous formula. The outcome of these proposed measures remains to be seen.

Notice Periods and Termination Procedures

There are no required notice periods under local law. However, under the Worker Adjustment and Retraining Notification Act (Warn Act), covered employers must provide affected employees, certain government entities and officers, as well as union representatives, with 60 days' advance notice of plant closings and mass lay-offs, as such terms are defined by law.

Union-free employers are at liberty to establish reasonable procedures for progressive discipline and employment terminations. However, any internal rules, regulations and policies adopted by the employer must be provided to employees in writing. Courts in Puerto Rico have jurisdiction to determine whether an employer's policies are reasonable and whether employment termination is justified. The burden of proof in wrongful discharge cases falls on the employer.

Employers with unions are required to comply with the terms and conditions of the applicable collective bargaining agreement prior to implementing terminations, including any internal disciplinary procedures or appeal processes for terminations that may have been adopted.

7.2 Notice Periods/Severance

Please refer to **7.1 Grounds for Termination (Notice Periods and Termination Procedures)**.

Law No 80, discussed therein, establishes statutory severance for terminations without just cause. All out-of-court payments should be made in exchange for a separation or settlement agreement and full release.

7.3 Dismissal For (Serious) Cause (Summary Dismissal)

Summary dismissal is not favoured in Puerto Rico. However, it is still settled that, in certain circumstances, it is warranted. Typically, summary dismissal is reserved for incidents or behaviour of a kind that would make it imprudent to await their repetition, or that lay bare a clear and undoubtable condition of character that carries with it either actual or potential grave consequences or reveals an attitude not susceptible to change. For example, summary dismissal has been upheld in cases of workplace violence, sexual harassment and falsification of employment documents or records (including providing false information on a job application).

7.4 Termination Agreements

Termination agreements are permitted in Puerto Rico. However, like any contract, they cannot contravene laws, morals, or public order. Moreover, consent to them cannot be obtained by duress or undue pressure. Releases must be supported by adequate consideration.

Under Law No 80, employees cannot prospectively waive and release their right to sue their employer for wrongful discharge in an employment contract. However, employees are permitted to settle Law No 80 claims as part of the termination process.

7.5 Protected Employees

Regarding the protection of certain classes of employees, please refer to **8.2 Anti-discrimination Issues**.

Employees in Puerto Rico are also entitled to protection from workplace harassment (also referred to as “mobbing”), pursuant to Law No 90-2020. The term “workplace harassment” is defined as malicious conduct that is unwanted, repetitive and abusive, arbitrary, unreasonable or capricious, not related to legitimate business interests, and that infringes on constitutionally protected rights (such as the protection against attacks to the employee’s reputation or private life, or risks to the employee’s health and integrity). However, to constitute unlawful workplace harassment, the conduct in question must truly be unrelated to the employer’s legitimate business interests. Accordingly, reasonable actions directed to ensure the proper operation of the workplace will not be considered mobbing, even if they are unpleasant, unpalatable, or unpopular to employees.

Employers are required to have anti-mobbing policies in place, as well as investigate allegations of workplace harassment and take corrective measures if the allegations are substantiated. It is worthwhile noting that, while other prohibited forms of harassment require evidence that they are perpetrated by a superior towards a subordinate, such as quid-pro-quo sexual harassment, unlawful mobbing can take place by and between employees of any rank. Workplace harassment by third parties and non-employees is also prohibited. The employer shall be liable for the actions of its supervisors and other employees who engage in workplace

harassment, when the employer, its agents, or its supervisors "knew or should have known" of the improper conduct, unless the employer can prove that it took immediate and appropriate action to stop the conduct. This defence is not available when it is determined that the employer itself engaged in the prohibited conduct.

Unlike other local discrimination and harassment statutes, employees must exhaust both internal remedies within the company and external remedies with the Alternate Dispute Resolution Bureau of the Judicial Branch through a mediation process as a prerequisite to filing a lawsuit in court.

Puerto Rico law also provides whistle-blower protections, discussed in **8.2 Anti-discrimination Issues** (Whistle-Blowing).

8. EMPLOYMENT DISPUTES

8.1 Wrongful Dismissal Claims

As discussed in **7.1 Grounds for Termination**, just cause for termination is required under Puerto Rico law. Accordingly, any employee who believes that they have been wrongfully terminated can file a claim under Law No 80. The exclusive remedy for wrongful discharge claims is statutory severance, as calculated under Law No 80. For employees who are hired for a specific period under a written employment agreement, what constitutes adequate cause for termination shall be determined by the contract.

The employer typically bears the burden of proof in wrongful discharge cases. However, in cases where the employee claims constructive discharge, the employee bears the initial burden of proof to establish that the circumstances surrounding their resignation meet the criteria for an involuntary discharge.

8.2 Anti-discrimination Issues

In addition to the protections established by federal discrimination statutes, under Puerto Rico laws, employees are protected from discrimination based on age, race, colour, creed, sex, disability, sexual orientation, gender identity, social or national origin, social condition, political affiliation, religious ideology, authorised use of medical marijuana, being a victim or being perceived as a victim of domestic violence, sexual aggression or stalking, serving or having served in the armed forces of the United States, or holding veteran status. Employers cannot take any adverse employment action because of any of these conditions.

Specifically, under Puerto Rico Law No 100 of 30 June 1959 (Law No 100), any employer (public or private) who refuses to hire a person; discharges or discriminates against an employee regarding their salary, terms or conditions of employment; or classifies its employees in any manner which tends to deprive a person of employment opportunities or affect their status as an employee based on any of the aforementioned factors, will incur civil liability, which may consist of a sum equal to twice the amount of damages sustained by the employee, and will also be guilty of a misdemeanour. The law also provides the same penalties for any employer that discriminates because the person in question is married to another employee of the employer.

All public and private employers are also required to develop and implement a protocol to avoid and/or manage episodes of domestic violence in the workplace.

Damages and Compensation

Since 2017, compensatory and punitive damages in discrimination cases under local law are capped to the limits established by Title VII of the Civil Rights Act of 1964. Employers who have fewer than 101 employees will have a cap of

USD50,000; employers who have between 101 and 200 employees have a cap of USD100,000; employers who have between 201 and 500 employees have a cap of USD200,000 and employers who have upwards of 501 employees have a cap of USD300,000. This cap also applies in cases of retaliation.

All discrimination cases under Puerto Rico law are adjudicated using a burden-shifting framework like the one employed under Title VII.

Discrimination on the Basis of Sex and Sexual Harassment

Puerto Rico Law No 69 of 6 July 1985 (Law No 69), requires strict compliance with the constitutional guarantee that no person shall be discriminated against because of sex. The main purpose of this law is to guarantee the equal right to employment for women as well as men, while prohibiting discrimination and imposing penalties for the same. The prohibition of discrimination on the basis of gender applies equally to public and private-sector employers. In furtherance of pay equality between genders, employers are also specifically prohibited from inquiring as to an employment candidate's salary history, including salary, benefits, perquisites, and any other form or remuneration, or combination thereof.

Puerto Rico Law No 17 of 22 April 1988 (Law No 17) prohibits sexual harassment in the workplace and establishes responsibilities and penalties in connection with the same. Sexual harassment is defined as any type of undesired sexual approach, demand for sexual favours and any other verbal or physical behaviour of a sexual nature, through any means, including electronic means such as emails or the use of the internet, when one or more of the following circumstances occurs:

- when submission to such conduct becomes, implicitly or explicitly, a condition of the person's employment;
- when submission to or rejection of such conduct by the person becomes the grounds for decisions on the job, or regarding the job; and
- when that conduct has the effect or purpose of interfering unreasonably with the performance of that person's work or when it creates an intimidating, hostile or offensive working environment.

In cases of sexual harassment, the employer's responsibility extends not only to its own actions, but also to the actions of its agents and supervisors, regardless of whether the employer knew, or should have known, about the illegal behaviour. Employers are required to take the following measures to maintain a workplace environment that is free of sexual harassment:

- explain to supervisors and employees that there is a strong policy against sexual harassment;
- create awareness of sexual harassment;
- provide publicity in the workplace so that job applicants are aware beforehand of the policy of the business against sexual harassment; and
- establish an adequate internal procedure to handle sexual harassment complaints.

Persons responsible for acts of sexual harassment will be subject to civil liability, including a sum equal to double the amount of the damages that the action has caused the employee or job applicant, among other remedies.

The rights of working mothers under Law No 3 are discussed in **2.5 Other Terms of Employment**.

Military and Jury Service

Puerto Rico Law No 44 of 19 May 1976 forbids employers from dismissing or discriminating against an employee by reason of their absences in the performance of any military duty. Violations of this law are a felony, punishable with a fine not exceeding USD5,000 or by imprisonment for no more than three years, or both. The affected employee shall have the right to reinstatement without any loss of pay, as well as privileges and/or benefit rights.

Puerto Rico law also affords protection to employees from any action that adversely affects their employment in connection with their service as jurors or witnesses.

Whistle-Blowing

Puerto Rico Law No 115 of 21 December 1991 (Law No 115), provides protection for any employee who testifies or attempts to testify before any administrative, legislative or judicial forum. Law No 169 of 29 September 2014 extended this protection to internal complaints.

Employers are subject to double damages, reinstatement, back pay, benefits and attorney's fees if any employee proves that they were the victim of adverse employment action for whistle-blowing activities covered under the law. The statute of limitations under Law No 115 is three years.

Anonymous complaint procedures are not required.

9. DISPUTE RESOLUTION

9.1 Judicial Procedures

The Puerto Rico Department of Labour and Human Resources created the Office of Mediation and Adjudication (OMA) pursuant to Law No 384 of 17 September 2004. Parties can elect mediation and adjudication of their cases and other benefit claims by the OMA under Law No 80, Law No 180, and Law No 379.

9.2 Alternative Dispute Resolution

The Puerto Rico Department of Labour and Human Resources also provides arbitration services. The Bureau of Conciliation and Arbitration was created to mediate in labour-management disputes, to assist parties in collective bargaining negotiations, and to provide labour arbitration services free of charge.

The Anti-discrimination Unit (ADU) is another specialised forum of the Puerto Rico Department of Labour and Human Resources. Although exhausting administrative remedies is not required under Puerto Rico employment laws, the ADU mediates and conducts informal hearings in discrimination cases under Law No 100 (general anti-discrimination), Law No 17 (sexual harassment) Law No 44 (disability), Law No 69 (sex), Law No 3 (maternity), and Law No 427 (breastfeeding).

For federal claims, agencies such as the NLRB and the Equal Employment Opportunity Commission (EEOC) have offices in Puerto Rico. Claims can be brought at federal and state levels, and class actions are available in Puerto Rico.

Pursuant to the Alternative Dispute Resolution Regulations of the Puerto Rico Supreme Court, mediation requires the consent of both parties. A party cannot be forced to mediate a case.

Pre-dispute arbitration procedure agreements are enforceable.

9.3 Awarding Attorney's Fees

In discrimination or retaliation cases, the prevailing employee may be awarded back pay, front pay, emotional and compensatory dam-

ages, attorney's fees and/or reinstatement. The award of attorneys' fees in favour of the prevailing employee will be 15–25% of the judgment.

Puerto Rico Law No 402 of 12 May 1950 explicitly prohibits the imposition of attorney's fees on employees who are forced to file suit against their employers under federal or local labour and employment legislation or an employment or collective bargaining agreement. However, though unusual, some courts have held that employers can be awarded attorney's fees if it is found that the employee's complaint was frivolous or vexatious.

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AUTHORS

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Contributed by: *Edwin J. Seda Fernández and Mariel Y. Haack,*
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

208 Ponce de Leon Avenue
Suite 1600
San Juan
Puerto Rico 00918

Tel: +1 (787) 756 9000
Fax: +1(787) 756 9010
Email: seda@amgprlaw.com
mhaack@amgprlaw.com
Web: www.amgprlaw.com

Trends and Developments

Contributed by:
Edwin J. Seda Fernández and Mariel Y. Haack
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C. ***see p.26***

Puerto Rico Enacts Workplace Protections for Medical Cannabis Patients

Uncertainty regarding the legal status of medical cannabis in the workplace

Since the enactment of the Act to Manage the Study, Development, and Investigation of Cannabis for Innovation, Applicable Norms and Limitations, Law No 42-2017 (Law No 42), a number of business activities related to medical cannabis have been legal in Puerto Rico, when properly licensed. Such activities include the cultivation, manufacturing, dispensing and transportation of medical cannabis, as well as operating laboratories where cannabis is processed.

Law No 42 also regulates, through a medical advisory body, those medical conditions that may be treated with medical cannabis, among other issues related to the use of medical cannabis. Law No 42, however, fell short of extending any protection in the workplace to employees using medical cannabis. Moreover, since marihuana is still considered an illegal substance under federal law, employees with medical cannabis prescriptions are not protected under laws such as the Americans with Disabilities Act (ADA). In addition, neither Law No 80-1976 (relating to wrongful discharge), Law No 100-1959 (relating to discrimination) Law No 59-1997 (relating to drug testing in the workplace) nor Law No 44-1985 (relating to disability discrimination), provide any protection for termination or discrimination against employees who use medical cannabis. Accordingly, an employee could be legally using medical cannabis in Puerto Rico and still be exposed to discipline in the workplace or termination. Employers were also free to refuse to hire candidates who self-reported as medical marijuana patients, or who tested positive for the substance in pre-employment drug testing. In other words, there was no express protection for employees in Puerto Rico against termination or discrimination for the use of medical cannabis, despite the existence of a state-regulated programme that specifically permits the same. This situation created a great deal of uncertainty for employees and employers alike, and led to inconsistent treatment of medical marijuana use in different settings.

Attempts at clarifying legislation

In an effort to address this issue, soon after the enactment of Law No 42, on 21 August 2017, the Puerto Rico Legislature drafted House Bill 1197, to amend the same. The purpose of this bill was to prevent employers from discriminating against any employee who is duly registered and authorised to use medical cannabis, during the processes of recruitment, hiring, appointment, and employment termination. It would have also protected employees against any penalties imposed by the employer on the newly protected class of employees. However, under House Bill 1197, if the employer could have established, by preponderance of the evidence, that the use of medical cannabis interfered with the essential functions of the job; or represented a real threat of harm or danger to people or property; or exposed the employer to the cancellation or loss of a licence, permit, or certificate related to any federal law or regulation, the protections of the law would not have been extended to the "patient-employee". House Bill 1197 failed to gain sufficient traction in the legislature and did not pass.

On the other hand, Puerto Rico Senate Bill 878, a proposed amendment to Law No 59-1997,

Contributed by: *Edwin J. Seda Fernández and Mariel Y. Haack,*
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

the Act to Regulate the Detection of Controlled Substances Tests in the Private Labour Sector, would have created a cause of action for candidates for employment or employees against disciplinary actions taken by the employer, which included hiring, promotions and transfers, due to that employee or candidate testing positive for a controlled substance for which they had a duly issued medical prescription. Ultimately, Senate Bill 878 also failed.

Act 15-2021

Finally, on July 29, 2021, Governor Pedro Pierluisi signed into law, Act 15-2021, which amends Act No 42-2017, the Act to Manage the Study, Development and Research of Cannabis for Innovation, Applicable Standards and Limits, to correct the existing divergence between the Puerto Rico government's position on medical marijuana and its treatment in the workplace. The enactment of Act 15-2021 provides employment protections to registered and authorised medical cannabis users by creating a protected category for these employees in their workplaces.

Under Act 15-2021, employers shall not discriminate against an employee who is a registered and authorised medical cannabis patient in the process of recruitment, hiring, promotion, discipline or termination, or with regards to any other terms and conditions of employment. The provisions of Act 15-2021, are to be interpreted liberally in favor of the registered and authorised patients of medical cannabis.

These employment protections are not absolute, however, as Act 15-2021 recognises certain exclusions if the employer can establish, by a preponderance of the evidence, any of the following:

- the use of medical cannabis represents a real threat of harm or danger to others or property;
- the use of medical cannabis interferes with the employee's performance and essential job functions;
- the use of medical cannabis by the employee would expose the employer to the risk of losing any licence, permit, or certification related to any federal law, regulation, programme, or fund; or
- the registered and authorised patient ingests or possess medical cannabis in the workplace and/or during working hours without the employer's written authorisation.

Act 15-2021, provides that no employer shall be penalised or be denied any licence, contract, permit, certification or benefits under the laws of the Commonwealth of Puerto Rico for the sole reason that is employs medical cannabis users. Act 15-2021 entered into effect immediately upon its enactment.

Through this recently enacted legislation, Puerto Rico joins a handful of states that have adopted policies that in some way address anti-discrimination protections for medical cannabis patients. It is advisable for employers to revise their drug testing and discrimination policies to ensure that they are compliant with Act 15-2021.

Employers in this jurisdiction should remain alert for future developments, as the Medical Cannabis Regulatory Board and the Puerto Rico Department of Labor and Human Resources must adopt any regulations or administrative measures necessary to ensure the effective implementation of Act 15-2021 within 90 days, that is by 27 October 2021. Expert advice from labour and employment specialists is advisable.

Contributed by: *Edwin J. Seda Fernández and Mariel Y. Haack,*
Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

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Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

Adsuar Muñiz Goyco Seda & Pérez-Ochoa, P.S.C.

208 Ponce de Leon Avenue
Suite 1600
San Juan
Puerto Rico 00918

Tel: +1 (787) 756 9000
Fax: +1(787) 756 9010
Email: seda@amgprlaw.com
mhaack@amgprlaw.com
Web: www.amgprlaw.com