

LABOR LEGISLATION

15 FREQUENTLY ASKED QUESTIONS

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1. What may you ask at a job interview?

When contracting high-ranking management positions, a company usually hires a firm that specializes in the process of candidate recruitment and selection; however, when contracting other positions, customarily the company itself carries out both processes. In such cases, the reform of the labor code that seeks to eliminate the discrimination of people in labor relations (the discrimination prohibition starts with the recruitment process and is maintained even once the labor relation has ended) must be taken into consideration when the interview takes place.

During the interview and/or in its application form, the company must eliminate any question that might imply discrimination due to age, ethnic group, gender, or religion. Among others, the following are some of the questions that must be eliminated: religion professed by the applicant, sexual preference, and suffering of any contagious ailment. Further, the company must not publicly offer vacancies to people within an age range that might openly discriminate elderly people.

2. Can the company ask the applicant to submit to health examinations?

Article 71, apart f) of the Labor Code establishes the employee's obligation to have a medical in order to verify that s/he does not suffer a permanent disability or any incurable or contagious professional illness. The employer may ask for this medical check-up during job application, or at any moment during employment. This examination may also be requested for any reason by an official public health or social prevention organization.

Nevertheless, if the examinations are for AIDS, article 71 would be implicitly repealed by article 10 of the General Law about HIV-AIDS since it establishes -among other things- the prohibition of labor discrimination against any employee with HIV-AIDS. Hence, it is prohibited to request employees or job applicants for medical reports or certifications on their condition as carriers or not of the HIV in order to get a job or keep it. The employee is not required to inform about the condition of his/her HIV infection, and should the employee inform the employer, s/he must keep the information confidential and make sure that the necessary changes for his/her better performance are made.

3. Should contracts of employment be oral or written?

Although the signing of written contracts is not a common practice because many times it is substituted by simple personnel form, the truth is that Costa Rican labor legislation establishes that contracts of employment may only be oral as far as they concern the following activities: a) strictly agricultural or livestock work; b) house work; c) unexpected or ninety-day temporary work; d) contracts for a specific work as long as its value is not more than two hundred and fifty colones.

This legislation established list must be regarded as restrictive. Thus, any kind of contracting that is not within the list must necessarily be written since according to article 25 of the Labor Code, the non-observance of this list is attributed exclusively to the employer, which reaffirms the assumption of his/her existence, unless the employer manages to undermine this assumption in a valid way.

4. According to their duration, which kinds of contracts of employment are there?

In terms of duration, a contract of employment may be for a specific work, for a specific period of time, or for an indefinite period of time.

Specific work contract: This refers specifically to the duration of a specific project or work; for instance, the implementation of projects or a

building work. Once the contracted service ends, the labor relation does too with no liability for either party, which both parties should amply know. The employer must only pay the amount corresponding to vacations and mandatory Christmas bonus (Aguinaldo).

Contract for a specific period of time: In this kind of contracting, both parties know from the beginning the starting and ending date of their contractual relation. Therefore, when the relation ends, the employer must only pay the equivalent of vacations and mandatory Christmas bonus proportional to the time worked because what operates is the advent of the completion date; a situation that both parties acknowledge. The most important point in this kind of contract is to make sure that its nature allows an easy determination of the starting and ending dates because it is not convenient to use it for duties which are permanent and characteristic of the normal development of the company; that is, duties that are the company's main activity.

Likewise, in accordance with article 31 of the Labor Code, should either party put an anticipated end to such a contract without a fair cause, that party must pay the other the concrete damages that could be proven through the courts. If the employer decides to put an anticipated end to the contract, s/he should also pay the employee a day for every seven days of continuous carried out work or smaller fraction, but in no case should it be less than three days of salary worth if the contract was agreed for less than six months, and

twenty-two days salary's worth if the stipulated period of time was more than six months.

Contract for an indefinite period of time: Undoubtedly, this is the most approved contracting method in labor matter because of the certainty that it offers the employee since it guarantees the minimum fulfillment of his/her obligations. In this kind of contracts, either party can put an end to the contract before the first three months of work counted from the date the relation started end. This period, commonly called trial period, authorizes either party to put an end to the relation without liability, but it does force the employer to pay the items of vacations and Christmas bonus due to the fact that the law claims they cannot be renounced.

Thus, the contracts of employment for a specific work and a specific period of time should only be used in exceptional cases, and their duration should not be more than a year. Once that period is exceeded, the contracting automatically becomes a contract for an indefinite period of time.

5. What workers have the right to a day of rest per week?

Article 152 of the Labor Code establishes that every worker with no exceptions has the right to one day of absolute rest for every six days of continuous work. The purpose of this day of rest is to allow the employee to satisfy his/her personal and family needs. This day will be paid for those working at businesses, or whenever it

has been stipulated in that way (i.e.: those who receive fortnightly or monthly salaries). It rests with the employer to determine the day of rest, which may be any day of the week and not necessarily Sunday since in our legislation the figure that exists is a weekly rest and not a Sunday rest.

6. What happens if an employer forces an employee to work on his/her day of rest?

The employer that does not grant its employees the day of rest is breaking the labor regulations, and is risking the sanctions established in articles 608 and 614 of the Labor Code. Additionally, the employer must pay double the amount of the employee's ordinary salary for the time s/he worked. The purpose of these sanctions is to avoid employers from taking some kind of reprisals or disciplinary measures against the worker who refuses to work on his/her day of rest.

7. Which are the holidays and how should they be paid?

When talking about holidays, we refer to specific days established by law or by common consent to commemorate civic or religious activities. The law makes compulsory the payment of the following holidays: January 1st, April 11th, Good Thursday and Good Friday, May 1st, July 25th, August 15th, September 15th, and December 25th.

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The payment of these holidays must be done in accordance with the employee's usual or normal salary if s/he receives a salary for a time unit (by hour, daily, weekly, fortnightly or monthly). If the employee does piecework, the payment of the holiday is made in accordance with the average of the salary earned during the immediate last week.

On the other hand, the non-compulsory payment holidays are August 2nd, and October 12th. The method of payment must be considered when paying the non-compulsory payment holidays. Whenever the method of payment is fortnightly or monthly in any activity, or even weekly in trade business; every holiday must be paid, whether it is compulsory payments or not. If the method of payment is daily or weekly, and it is not in trade business, the employer must only pay the compulsory payment holidays—even if the employee did not work on those days—and the non-compulsory ones if the employee in fact worked on those days.

8. Is it mandatory for the employee to work on holidays?

In principle, it is forbidden for employers to oblige their employees to work on holidays, whether they are compulsory payment holidays or not. Every employee has the right to have the benefit of the holidays, even if they are non-compulsory payment holidays. If employees are obliged to work on a holiday, and it is not an exception (these are established in

articles 150 and 151 of the Labor Code), the employer could be worthy of a fine and must pay the employee double the amount of the salary for the hours of work (except in the case of non-compulsory payment holidays, particularly in the case of employees who are paid daily, weekly and do not work in trade business).

9. What is dismissal with employer liability?

A dismissal is a unilateral action that stems from the employer, and has the purpose of putting an end to the labor relation with the employee. In the private sector, in contrast with what occurs in the public sector, there exists the so-called *incausado* dismissal, which is the employer's authority to dismiss an employee, as long as s/he pays the amounts corresponding to vacations, mandatory Christmas bonus, forewarning, and severance pay. It is called dismissal with employer liability because it is the employer who assumes the responsibility for the dismissal; thus, s/he is obliged to pay the amounts mentioned above.

10. Who cannot be dismissed with employer liability?

The unjustified dismissal or dismissal with employer liability is not applicable in those cases where the employee, due to legal provision, holds a special protection privilege called "absolute stability". The employees that are covered by this special protection are pregnant or in pre-weaning period employees, under aged employees, disabled

employees (during the first three months), any person who has reported sexual harassment, employees protected by union special protection, employees dismissed due to discrimination, and employees that are standing up to their employer in a collective conflict of economic and social nature. In these special privilege cases, it is only appropriate to dismiss without liability, which may lead, in some cases, to the previous carrying out of a procedure to confirm the seriousness of the employee's default.

11. What is dismissal without employer liability?

The dismissal without employer liability takes place when the employer puts an end to the labor relation due to a serious default committed by the employee. The causes of dismissal without employer liability are established in articles 81 and 369 of the Labor Code, and they constitute a restrictive list. Hence, the parties cannot add new reasons besides the ones established by law. In order for a dismissal to be considered legitimate, three principles must coincide: cause and effect nexus between the employee's default and the dismissal, a proportion between the committed default and the imposed sanction, and timing of the default (once the commission of the default is known, the dismissal must be enforced within a month). When an employee is dismissed because s/he committed a serious default, s/he must not receive any indemnification, except for the amount corresponding to vacations and Christmas bonus.

12. What is a resignation?

It is the unilateral and voluntary action through which the employee puts an end to the labor relation s/he has with his/her employer, and which has its grounds on articles 20 and 56 of our Political Constitution, which specifically forbids hard labor and guarantees free choice of a job.

The employee may present his/her resignation in any moment of the labor relation and the only thing s/he must fulfill is the forewarning period pointed out in article 28 of the Labor Code. It may be presented in written or orally. For the employee's legal certainty, in the first case it is recommended to have a receipt copy from the employer and in the second case that the statement is made in front of one or two witnesses.

13. What is unilateral contract termination?

When the employer commits a serious default to his/her obligations, the affected employee has the possibility of breaking down the contract unilaterally with the employer's liability and without losing his/her right to receive the payment of vacations, Christmas bonus, forewarning and severance pay.

This should not be confused with a resignation, mainly because of the effects that each one involves. Whereas the resignation is a voluntary action where the employee's interest of not working exists, in the unilateral breakdown, the employee is forced to put an end to the labor relation, not of his/her own free will,

but rather because the default committed by the employer makes the labor relation unbearable. This is precisely why in view of a resignation, the employee not only loses his/her right to cash forewarning and severance pay, but also is obliged to fulfill the forewarning period with the employer. In contrast, in the case of a unilateral breakdown, the employee, understandably, is not obliged to give any forewarning to the employer and does not lose the right to cash the forewarning and severance pay since the labor relation did not come to an end because of his/her own will but because of one of the defaults indicated in article 83 of the Labor Code that are imputable to the employer.

14. What is a labor settlement?

A labor settlement is the apt instrument to put an end to the labor link. It is an agreement in which both parties (employer and employee) recognize the existence of the labor relation, the reason for the end of the contract, and finally the indemnifications and payments that the employee will receive by virtue of the completion of the labor relation. The settlement is a private document referred to judicial legislation; thus, before labor judges it will be ineffective and it will not be validated if it

goes against labor rights that by legal principle cannot be renounced. This means that if the employee's rights are not satisfied, s/he can take legal action to demand the labor rights that were not recognized, even if in the settlement s/he promised not to report any judicial action against his/her former employer.

15. What happens when the labor settlement takes place under the protection of the Conflict Resolution system?

The position of the courts of justice when a labor settlement goes against rights that cannot be renounced is clear: the settlement has no validity or effect. Nevertheless, when the agreement is made under the protection of the Conflict Resolution system (mediation, conciliation or arbitration), it will have the same effectiveness as a judicial ruling. Any particular, physical or lawful person can solve a problem through mediation, conciliation, or arbitration, since these means of extrajudicial negotiation have the authority and effectiveness of a final ruling (*res judicata*), and they can be executed immediately (by express law mandate), which means that they cannot be discussed later through legal action.

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