



# CHILE

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**Q** WHAT NOTABLE DEVELOPMENTS IN EMPLOYMENT LAW HAVE YOU SEEN IN CHILE OVER THE LAST 12 MONTHS OR SO? HAVE THERE BEEN ANY SIGNIFICANT CHANGES TO EMPLOYEE RIGHTS OR COMPANY OBLIGATIONS, FOR EXAMPLE?

**AITKEN:** A relevant change to Chilean labour legislation took place last year and yet another, and more important change, is about to occur. On 9 July 2014, a new piece of legislation came into force, regulating the possibility of having companies belonging to the same holding structure being declared as a sole employer for labour and social security purposes. There is currently a bill on unions and collective bargaining being discussed by Congress, which is expected to be approved during 2015. The bill intends to substantially amend the existing collective bargaining process and give greater powers to the unions by, *inter alia*, appointing unions as the main actor for collective bargaining processes, banning replacements during a strike, banning employees from individually returning to work during a strike and automatically extending the benefits of a collective bargaining agreement to personnel who join the union afterwards.

**Q** HOW WOULD YOU DESCRIBE LABOUR RELATIONS IN CHILE AT PRESENT? TO WHAT EXTENT HAS THE INFLUENCE OF UNIONS AND WORKERS COUNCILS GROWN?

**AITKEN:** Chile is perceived to be in a better position than other countries in the neighbourhood, when it comes to labour relations. However, there is substantial uncertainty and concern connected to the bill which will significantly boost unions and collective bargaining, and considerably weaken the employers' position in the event of strikes. Union membership will likely grow significantly since, in order to engage in collective bargaining processes, employees will have to join an existing union within the company or form a new one. Similarly, employees will have to join an existing union to obtain the benefits under a collective bargained agreement. It is expected that the current unionisation rate – close to 12 percent – will significantly increase, not necessarily as a consequence of a real interest of employees to join the union, but rather as an artificial consequence of the new structure proposed by the bill.



**Q** ARE YOU SEEING ANY RECURRING THEMES IN EMPLOYMENT RELATED LITIGATION IN CHILE?

**AITKEN:** Since most of the cases discussed before labour courts relate to termination of employment and severances claims, it is important to mention that courts are becoming increasingly demanding with employers on the standards to demonstrate or evidence showing the grounds to justify a dismissal. Due to the fact that case law is not binding under the Chilean legal system, but has only persuasive authority, we have experienced both inconsistent court decisions by lower courts as well as changes to criteria at the Supreme Court level with a marked trend in favour of employees' interests.

**Q** FOR COMPANIES IN THE PROCESS OF RESTRUCTURING, WHAT EMPLOYMENT ISSUES DO THEY NEED TO EVALUATE WHEN RESIZING THE WORKFORCE, REDUCING PAYROLL COSTS AND ADJUSTING PENSIONS AND BENEFITS? WHAT KINDS OF RISKS AND LIABILITIES MIGHT ARISE IN SUCH CIRCUMSTANCES?

**AITKEN:** Whenever a restructuring process implies termination of employment, it is relevant to analyse if and to what extent such restructuring arises from an actual business necessity and, therefore, whether it is possible to meet the statutory grounds for termination based on business need before a labour court. If the proposed restructuring, such as a spin off, could be regarded as an anti-union practice or a violation of employees' fundamental rights, it may result not only in fines but in a two year ban for contracting with the state. Finally, it should be determined whether, despite the restructuring, the resulting entities could still be at risk of being declared as a sole employer. Any reduction of remunerations and benefits in order to reduce the payroll costs should be executed with the agreement of the relevant employees, since an employer may not unilaterally amend remunerations or benefits granted. Moreover, any collective bargained benefit may only be modified through collective agreement and not individually with each employee. Some types of restructuring could trigger an automatic transfer of employees with all their rights, obligations and past liabilities.



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**Q** WHAT GENERAL ADVICE WOULD YOU GIVE TO COMPANIES ON MANAGING THEIR HUMAN CAPITAL AND RETAINING KEY TALENT?

**AITKEN:** In our experience, it is important to consider that local HR is managed by someone who is familiar not only with local regulations regarding compensation and benefits, but also with the cultural aspects of the relationship with employees, including their fundamental rights, harassment, equal pay and non discrimination. Having a proper work environment requires a comprehension of Chile`s idiosyncrasies, avoiding cultural gaps that may affect relationships and understanding between the parties. Retaining key talent is a challenge in respect of which we suggest at least three main subjects should be considered. The first is the manner in which the employees are compensated, including performance and goal bonuses, severance packages and additional benefits. The second is whether a clear career path or opportunities to grow intellectually and professionally are available. The third is whether the firm offers an attractive corporate reputation, culture and values, which is particularly attractive in certain industries.

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**Q** IN YOUR OPINION, HAS IT BECOME MORE DIFFICULT FOR COMPANIES TO REWARD THEIR EXECUTIVES AND EMPLOYEES? WHAT DO COMPANIES NEED TO TAKE INTO ACCOUNT WHEN STRUCTURING COMPENSATION PACKAGES, INCENTIVES AND BENEFITS?

**AITKEN:** We do not believe it has become more difficult to reward employees. We would encourage global or international companies to have their international policies and remuneration structures reviewed in advance by local counsel before they are implemented in Chile, as employment is a highly regulated matter and such regulations are uniquely local. Tax and social security impacts should also be addressed in such a review.

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**Q** AS GLOBALISATION CONTINUES, WHAT ADDITIONAL CHALLENGES FACE MULTINATIONAL COMPANIES IN TERMS OF CROSS-BORDER EMPLOYMENT AND DEALING WITH FOREIGN WORKERS?

**AITKEN:** A recurrent issue we experience is related to the effects and side effects of structuring employee transfer schemes from different entities of the corporate group through different countries. For example, it is a common practice to suspend the employment relationship in the 'home country' whilst a new relationship with the Chilean local entity begins. This may cause duplication of any benefits and difficulties in connection with employment termination for cause, where although the employee's breach in one country may justify a termination there, it is a different story in the other country where an employment contract is also present, even if it is suspended or dormant. Sometimes, even if the home country employment contract is terminated, under the laws of such country, the employment relationship continues as a matter of law – despite any employment termination and release – by the mere fact that the employee continues to render services in another entity of the same group.

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