

Fraud, Investigations, and Employee Dismissals in Latin America

Best Practices for Employers



Prepared by the Employment Law Alliance



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Fraud, Investigations, and Employee Dismissals in Latin America

Best Practices for Employers

This publication is based on a 2015 webinar presented by a representative group of the Latin America members of the Employment Law Alliance focusing on “*Fraud, Investigations, and Employee Dismissals in Latin America: Best Practices for Employers.*” It provides a country-by-country overview of the key issues employers should know about investigating employee fraud and the processes they need to follow when terminating employment based on the findings of an investigation.

The three key issues addressed during the webinar – and again by the participating jurisdictions in this publication – are:

- What happens when an employer uncovers employee fraud?
- What process and rules should employers follow when conducting an investigation; what are the risks when they don’t?
- Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

See the list at right for the countries included in this publication and the page number for each.

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What happens when an employer uncovers employee fraud?

The first step is to execute an internal investigation (preferably performed by a third party or, if the company has multiple offices, by headquarters), while ensuring the investigated employee's rights enshrined in the National Constitution and protecting his/her personal data. If the employee is either a director or representative of the shareholders, the company may need to analyze taking measures to remove control from the employee and/or replace the employee to ensure the normal operation of the company.

The employer must maintain confidentiality during the investigation; doing otherwise could result in the affected employee not cooperating or deciding his/her constructive dismissal in order to collect final severance.

After the internal investigation, it is very important to rely on solid proof, obtained through legal means that could eventually justify a dismissal with just cause.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

The independent internal investigation should include, among other items, accounting documents and emails on the company email server. The investigation must guarantee the preservation of the original documentation, as well as confidentiality and privacy rights of the employee involved. Otherwise, the employee could claim the company for damages for any information that may be disclosed as a result of the investigative process.

Argentina has a very strict data protection law; thus, an employee's personal data cannot be transferred without his or her prior consent.

Email is considered to be the same as postal mail, and its inviolability is enshrined by the National Constitution. Prior express and written consent should be obtained to access employee's email prior to any type of audit. Doing otherwise could constitute a crime, subject to a penalty of six months to two years in prison.

Policies stipulating that the email is granted as a tool to work and reminding employees that there is no expectation of privacy with respect to emails sent from company computers should be carefully analyzed on a case-by-case basis. As a general comment, it is advisable that such policy is duly signed by the employee in wet ink.

When interviewing employees, it is advisable to do so with the intervention of a public notary. That way, in case of a formal claim to the company related to the dismissal, the public notary could be requested to testify as a witness.

During the investigation, the company could decide to give a precautionary suspension to the employee for a specified period (with payment of salary) so as not to obstruct the investigation. Notification of such action must be taken by a reliable communication, including details, and outlining the reasons for and duration of the suspension. Otherwise, not allowing the employee entry to the workplace or access to emails, and/or implementing any other measures that restrict the employee from carrying out his or her job tasks may be regarded as the employee being indirectly fired.

If a company is not able to adequately prove fraud, the dismissal should be executed as "without cause," with the corresponding payment of severances (e.g., compensation for dismissal without cause and compensation for the lack of prior notice).

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Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Dismissal under Argentine Labor Law can be executed with or without cause. Fraud committed by an employee could be considered fair cause to terminate the employment relationship, subject to a case-by-case analysis.

Dismissal without just cause

If the decision was to dismiss the employee without cause (e.g., because evidence was not sufficient to substantiate the cause or for other reasons), the company should pay the corresponding severance within four working days after the termination date.

In such case, in addition to the proportional 13th salary and pending vacations, the company should pay to the employee a compensation for seniority and for lack of prior notice.

In the event that no prior notice (but payment in lieu thereof) is given by the employer and the dismissal takes place on a day different from the last day of the month, the employee will collect, in addition to the compensation in lieu of prior notice, an amount equal to the salary corresponding to the remaining days of the month of dismissal (“Integration of the month of dismissal”).

Dismissal with just cause

In case of dismissal with cause, the specific cause should be provided in detail to the employee at the time of dismissal. The cause must be well founded; clearly described in the dismissal notice, as it may not be later modified; adequately substantiated (e.g., without general arguments); and refer to a damage that is serious enough to prevent the continuation of the employment relationship, that is, a serious contractual offence.

The notification to the employee should indicate the acts performed by the employee, the specific rules and/or company policies that the employee infringed or violated, and the date(s) of the infraction.

Taking into account the principle, *“In dubio pro Operator,”* the employer must have detailed evidence of fraud and be able to prove the authenticity of the alleged facts. Since trials in Argentina have no cost for employees, it is very common for an employee to reject the invoked cause for dismissal and claim the company in such regard. If an employer is not able to adequately prove fraud, it shall compensate the employee for dismissal without cause and for damages, recklessness, and malice. Therefore, it is very important to get as much evidence as possible (documents, witnesses, etc.) to defend the company in case a judicial claim is filed.

Finally, it should be noted that upon termination on any case (whether with or without cause) certain labor certificates should be provided to the employee.

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What happens when an employer uncovers employee fraud?

If the employer has unquestionable evidence of a fraud or serious misconduct, the employee can be terminated for cause. In Brazil, misconduct events that might give support to a termination for cause must be classified under the situations set forth by law, pursuant to [Article 482](#) of Brazilian Labor Code (C.L.T.), as follows:

- a) Dishonest act;
- b) Lack of self-restraint or improper conduct;
- c) Regular negotiation on his/her own account or for a third party without permission of the employer, or when the same is in competition with the company for which he/she works, or is prejudicial to his/her work;
- d) Criminal conviction of the employee, in final judgment, provided that the execution of the penalty has not been suspended;
- e) Sloth in the execution of his/her duties;
- f) Habitual drunkenness or drunkenness during working hours;
- g) Violation of company's rights regarding trade secrets and confidential information;
- h) Indiscipline or insubordination act;
- i) Abandonment of employment;
- j) Injurious act to the honor or reputation of any person, practiced during working hours, as well as physical violence practiced under the same conditions, except in case of legitimate self-defense or defense of other persons;
- k) Injurious act to the honor or reputation of his/her employer or superior ranking, or physical violence to them, except in case of legitimate self-defense or defense of other persons; and
- l) Constant gambling.

The main difference between a termination for cause and a termination without cause lies in the severance payments to be made in each situation (see question 3 below).

In the event of a termination for cause, it is important that the employer has full and unquestionable material evidence of the fault incurred by the employee, and that it is in fact a serious misconduct. Otherwise, such a dismissal may be challenged in court due to the lack of evidence or to the termination for cause being disproportional to the misconduct (when considered not too serious). The dismissal may even give cause for a claim of moral damages by the dismissed employee, as well as differences of severance payments.

In view of the above, in some cases where the evidence of the misconduct is not clear, the employer should conduct a detailed investigation.

Further, depending on the misconduct, the termination may also have criminal impact; thus, a case-by-case analysis is necessary.

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What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

In Brazil, there are no specific labor laws containing guidelines for conducting an investigation when a company detects a case of employee fraud or misconduct. However, employers should collect as much evidence as possible to: (i) withstand a possible disciplinary measure or a dismissal for cause (as the dismissal may be challenged in court); and/or (ii) withstand a potential judicial dispute brought by the company against the employee to retrieve any eventual losses it may experience.

Among the most common procedures employers should follow when conducting an investigation are:

- Interview, and obtain written testimonies executed by, the employees;
- Obtain documentary evidence;
- Maintain the confidentiality of the investigation in order to not compromise its result and not expose the involved employees;
- Verify the employees' records of disciplinary warnings;
- Verify the applicable collective conventions;
- Verify when the misconduct took place.

Employers do not necessarily need to follow this sequence, as the procedures may vary according to the misconduct; however, it is customary to interview the people involved and the witnesses to the misconduct, and to carry out an investigation to obtain and document the evidence.

Depending on the type of misconduct, it may be necessary for an employer to review an employee's emails and internet usage. While the labor courts recognize that employers are allowed to monitor – within certain limits – the working tools available to their employees, it is important to also confirm that the employment contract and the company's policy allow for these activities, that is, if such documents were duly signed by the employee who is the subject of the investigation.

Depending on the case, instead of a dismissal for cause, other disciplinary actions may be applicable, such as issuing a written warning or applying an unpaid temporary suspension. If there is evidence of the damage, the company may also file a suit against the employee for reimbursement of losses it may have experienced.

The evidence obtained from an investigation for a dismissal for cause is crucial, as the Brazilian labor courts have made clear that all evidence of a violation must be unquestionable. It is also necessary that (i) the violation is a serious infringement, and (ii) the employer's response (dismissal) is immediate as of the date the fraud was unveiled or the investigation completed. Any delay on the part of the company may be interpreted as tacit acquiescence.

If these requirements are not met, the employee may ask the court to convert the dismissal with cause to a dismissal without cause, rendering due the payment of the termination amounts, as well as general damages.

Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

In Brazil, the employer may dismiss an employee with or without cause. Dismissals for cause occur when an employee violates a legal or contractual obligation of employment, within the alternatives provided in Article 482 of the Brazilian Labor Code, thereby giving to the employer the right to terminate the existing employment contract.

The main difference between a termination for cause and a termination without cause lies in the severance payments to be made in each situation. When a company suspects fraud or other misconduct, but does not have enough evidence or proof, it can always follow a termination without cause.

Termination without cause can occur at any time as long as the employee to be terminated is not on vacation or sick leave, and is not otherwise entitled to a job tenure as provided by law (e.g., he/she is not a union leader, member of the internal commission for accidents prevention, pregnant, etc.), or by the applicable collective bargaining agreement (e.g., he/she is on the eve of retirement, just returned from vacation, etc.).

On the other hand, if the company decides to apply a termination for cause, but does not have strong and unquestionable evidence to support the dismissal, and if the termination is challenged in court, it may be considered abusive. The court could issue a decision to change the termination for cause into a termination without cause, and order the company to pay any differences in severance, as well as a possible indemnification for pain and suffering.

If the employee holds any kind of job guarantee, the court could cancel the termination, and determine the employee's reinstatement to work.

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What happens when an employer uncovers employee fraud?

The first thing an employer should do when uncovering employee fraud is evaluate whether or not the company is obliged by law or by its internal policies to conduct an investigation. Prior to initiating any sort of investigation, the employer should consider, for example, the magnitude and relevance of the fraud, the seniority and position of the affected employee, etc.

If an investigation process is conducted (without infringing an employee's constitutional rights) and is successful, depending on the seriousness of the events and provided there is enough evidence of the employee's actions, the employer may dismiss the employee with cause based on "lack of probity of the employee in the performance of its duties" ([Article 160 No.1](#) of the Labour Code).

In order to dismiss an employee for cause, the improper conduct constituting a fraud must be serious and duly proven. Furthermore, Labour Courts have added the following requirements to admit this ground of employment contract termination for cause: (i) the lack of probity must be attributable to the employee, current, related to the employment relationship, and linked to the employee's lack of honesty; and (ii) it must have caused a relevant damage to the company.

If an employer wants to terminate an employment contract for lack of probity, it has to deliver to the employee, personally or by certified mail, a dismissal letter informing the employee of the employment contract termination, the effective date of termination, the legal ground on which it is based, and a detailed description of all the facts that constitute the fraud.

It is very important to highlight the existence of conclusive and legitimate evidence against an employee in order to proceed with a termination for cause. This is due to the fact that, following a dismissal for cause, the employee will almost always sue the company for unlawful termination. The company has the burden of proof to demonstrate the fraud, and in so doing it may only allege and provide evidence in connection with the facts set out in the termination letter. Chilean Labour Courts are quite protective of employees and, thus, they impose a very high standard of proof for employers regarding lawsuits for unlawful termination.

Chilean law also expressly prohibits presenting evidence that has been obtained through unlawful or illegitimate means, especially if it was obtained in the course of violating the employee's fundamental rights (e.g., privacy and honour). An employer, therefore, should be prepared to present in court legitimate and conclusive evidence against an employee to demonstrate the existence of the conduct constituting the fraud and, as required by the Courts, the damage it caused to the company.

Finally, in addition to the employment termination and depending on the nature and magnitude of the fraud, the employer may (and in some cases it will be actually advisable to do so) take criminal or civil actions against the employee.

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What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

The internal investigation must be documented in writing; it also must be discrete, conducted in private, and guarantee that the affected employee is heard. The employer must also ensure the respect of employees' constitutional rights to honour, dignity, and privacy of communications and private life.

Once the investigation is completed, the company shall share the findings with the affected employee. If the evidence shows that fraud actually existed and the employee is effectively responsible for such conduct, the employer shall adopt the applicable measures and sanctions, which may include dismissal for cause without severance (except vacation payments). The employer should act promptly or the offense may be deemed forgiven by the Labor Courts.

If the employer conducts an investigation that goes beyond legal limitations, there are several possible adverse consequences for the company:

- a) The means of proof that were obtained through an illegal investigation procedure could be declared entirely invalid by the Labour Court.
- b) The company may be exposed to a lawsuit for infringement of fundamental rights either during the labour relationship or during the dismissal.
 - (i) Should the infringement of fundamental rights occur during the labour relationship, the company may be liable to pay damages, including pain and suffering, as well as administrative fines, and be barred from entering into contracts and to participate in tenders with the State of Chile for a two-year period.
 - (ii) Should the infringement of fundamental rights of the employee occur during the dismissal, the company may be liable to pay the employee an additional severance equal to 6-11 monthly remunerations (uncapped), as well as damages, including pain and suffering, and administrative fines. It will also be barred from entering into contracts and to participate in tenders with the State of Chile for a two-year period. Furthermore, if the Labour Court determines that the dismissal was discriminatory, it could order the employee reinstated to the company if the employee wishes so.

Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Chilean Labour Law establishes that an employment contract may only be terminated based on the grounds and according to the formalities set forth in the Labour Code. Such grounds are limited and can be divided into two groups:

- a) Grounds that do not give the employee the right to severance pay:
 - (i) Those where there is no fault of the employee (article 159 of the Labour Code):
 - Agreement of the parties;
 - Resignation of the employee;
 - Death of the employee;
 - Expiration of the term of a fixed-term employment contract;
 - Completion of the specific work or service for which the employee was specifically hired; and,
 - Act of God or force majeure.

- (ii) Those where the employment contract is brought to an end due to serious fault of the employee (article 160 of the Labour Code):
- Lack of probity in the performance of duties, sexual harassment, physical aggression or injury against the employer or other employees, verbal aggression against the employer, labor harassment, and serious immoral conduct affecting the business;
 - Carrying out certain acts in the same line of business as the employer where such acts have been expressly forbidden in the employment contract;
 - Absences from work with no justified cause during two consecutive days, two Mondays in a month, or a total of three days in a month, as well as unjustified absence (or without previous notice) if in charge of an activity, work, or machinery wherein abandonment or paralysation constitutes a serious disturbance to the development of the work;
 - Abandonment of work, which entails: (a) unreasonable or unjustified departure from the workplace during working hours without the employer's permission; and (b) failure to perform the work agreed in the contract without justified cause;
 - Acts, omissions, or fearless imprudence that affects the safety or functioning of the business or the safe performance of work by other employees or their health;
 - Intentional material damage caused to the facilities, machinery, tools, products, or goods of the employer; and,
 - Serious breach of obligations in the employment contract.
- b) Grounds that give the employee the right to severance pay:
- (i) Business necessities;
 - (ii) Dismissal at will of the employer; and,
 - (iii) Bankruptcy of the company.

In case of a dismissal for cause due to lack of probity in the performance of an employee's duties, the exposure of the company includes the following.

- a) If the Court rules in favour of the employee, the employer will have to pay severance in lieu of prior notice and the severance per years of services, the last one with 80% surcharge. The surcharge could even be 100% if the dismissal is declared frivolous (*carente de motivo plausible*).
- b) Additionally, it has become increasingly common that, together with suing for unlawful termination, employees are claiming violation of their fundamental rights. This claim is resolved through the Tutelage Procedure before Labour Courts. If this claim is presented jointly with a lawsuit for unlawful termination, the company is liable for the additional severance and subject to the sanctions outlined above.

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What happens when an employer uncovers employee fraud?

It will depend on the type of fraud. However, in general terms the employer will have the following alternatives:

- Initiate a disciplinary process in order to allege a just cause for terminating the employment contract; or
- Terminate the employee without cause, paying the mandatory severance; or
- Carry out a disciplinary process to impose a disciplinary sanction to the employee.

It is always most advantageous to carry out a disciplinary process to:

- Investigate both the facts and the participation of the employees in the fraud;
- Obtain evidence regarding the fraud and the participants;
- Ascertain the loss for the employer;
- Determine the risks associated with the fraud (legal and/or reputational); and
- Decide whether or not the employer will denounce the fraud before the criminal and/or governmental authority and/or a third party, as applicable.

In certain cases the employee may have special protection status; as such, an authorization from a labor authority or labor judge must be obtained prior to the termination.

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What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

There are three main Constitutional principles to be applied when an employer conducts an investigation: due process, publicity, and second instance.

The disciplinary procedure consists of two steps. The first begins with a formal invitation to the employee involved in the fraud to attend a disciplinary hearing. The formal notice shall include a brief description of the conduct/situations/facts that are subject to investigation, highlighting in a clear and precise manner the non-compliance and/or the disciplinary breaches resulting from said conduct/situations/facts.

During the disciplinary hearing, there shall be questions and inquiries about the facts and the reasons for the employee's conduct. The employee will be granted the opportunity to contradict the facts presented and provide his/her version of them. The employee must also have access to all the evidence that the employer has to prove the allegations and can, in turn, present evidence he/she wishes for the employer to study. Finally, the employee will be allowed to contradict the evidence against him/her and to submit new evidence that he/she considers necessary to support his/her position and/or explanations.

The employer will then have a reasonable term as specified in the internal working rules or the collective agreement to make a decision whether or not to impose a disciplinary sanction or terminate the employee.

The second step in the disciplinary process occurs only if the employer chooses to impose a disciplinary sanction on the employee. In such instances, the employee may appeal the decision before the department or person within the company designated for such purposes, and can present new evidence if he/she wishes to do so.

If the disciplinary process is not conducted and fulfilled, no sanction can be imposed and no just cause can be alleged. Further, if the employment relationship is terminated, there is a risk that a judge will order the employee's reinstatement or payment to the employee of the mandatory severance for termination without cause.

As previously mentioned, in certain cases the employee may have special protection status and thus an authorization from a labor authority or labor judge must be obtained prior to the termination.

Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

No. The employment contract can be terminated without cause and no notice or payment in lieu is required; however, a mandatory severance will apply.

If a Labour Court finds a dismissal (“with just cause”) to be illegal or abusive, it will proceed to order the mandatory severance payment or the reinstatement of the employee. The mandatory severance varies, depending on the type of contract and the employee's salary and seniority.

Under Colombian Labour law, if the employer terminates the employment relationship without cause, the employee is entitled to a mandatory severance, calculated in accordance with the following rules:

- In the case of fixed-term agreements, the salary corresponding to the time remaining until the completion of the term.
- In the case of indefinite-term agreements, the amount of the indemnification to be paid to employees upon termination of the employment agreement is:
 - o One year or less of seniority:
 - 30 days of salary if the employee's salary is below 10 minimum monthly legal salaries (MMLS); or
 - 20 days of salary if the employee's salary is 10 or more MMLS.
 - o More than one year of seniority:
 - 20 days of salary per year or a proportional fraction thereof, in addition to the 30 days for the first year, if the employee's salary is below 10 MMLS; or
 - 15 days of salary per year or a proportional fraction thereof, in addition to the 20 days for the first year, if the employee's salary is 10 or more MMLS.

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What happens when an employer uncovers employee fraud?

A disciplinary procedure may be initiated, which might result in termination of employment without the employer's responsibility. The employer may also file a criminal complaint.

If the terminated employee is subject to a special protection status, e.g., on grounds of pregnancy, an administrative procedure must be initiated before the Ministry of Labor ([Article 81\(L\)](#) of the Costa Rican Labor Code – severe misconducts).

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

From a labor standpoint, there are no specific rules that employers need to follow when conducting an investigation of this kind. In most cases, employers abide by their internal procedures as defined by the company's internal audits. The employer can, however, also file a criminal complaint, which will set the legal process in motion.

If an employer suspends an employee while conducting an investigation, it must be with pay, and the suspension must be based on objective reasons, such as to remove the employee from the workplace to avoid evidence being manipulated or covered.

If any applicable procedures and rules are not observed, the employment termination process may be deemed hindered and affected from an internal labor perspective. Any violation thereof might impact the decision to terminate the employee without the employer's responsibility.

Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

In order for an employee to be terminated without the employer's responsibility, there must be a severe cause for the termination. These causes have been established under [Article 72](#) in accordance with [Article 81](#) of the Costa Rican Labor Code.

Otherwise, the court may render the termination null and void, and order the employer to pay the employee any applicable amounts for severance. In addition, and depending on the specific situation, an employer may be required to reinstate the terminated employee to his/her former job, along with any unpaid wages and possible compensatory damages.

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What happens when an employer uncovers employee fraud?

Fraud is considered a felony in El Salvador, and participation in any kind of felony is a cause for termination of the labour relationship, as stated in [article 50](#) of the Salvadoran Labour Code. The article covers both employees who are found flagrant and fraud that is discovered as part of an investigation. Therefore, if an employee is found to be involved in the commission of a felony (flagrant or not), the employer can terminate the relationship without liability, i.e., the employer does not need to pay severance, although it does need to pay for any accrued vacations and the Christmas bonus.

It is always advisable for the employer to file a complaint before the General Attorney's Office as soon as the employee is terminated in order to have proof that the felony was the cause for the termination.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

An employer can conduct an investigation if it decides one is needed and as long as it does not violate the employee's fundamental rights. The employer can access computers and phone records, for example, that belong to the company since it is understood that all employees are to use this equipment only for work purposes. Proof of the fraud or wrongdoing has to be obtained and documented, preferably through a notarized document, which also includes the names of all of the people involved in the investigation and collection of evidence, as well as a statement of all the facts uncovered by the employer.

The risk of not conducting a proper investigation or not conducting one at all is that the employer would not have proof to demonstrate that the termination was carried out sheltered under the provision of [article 50](#) of the Labour Code. In this case, the termination would be considered illegal, and severance, accrued vacations, Christmas bonus, and probably unpaid wages would need to be paid to the worker.

Is it necessary to have a "cause" in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

In El Salvador there are two ways to terminate the labour relationship. The first one is termination with liability for the employer, whereby the employee is dismissed without "cause." This type of dismissal necessitates a severance payment, as well as payment for accrued vacation and accrued Christmas bonus in order to avoid any contingencies.

The second type of termination is without any liability for the employer, based on one of the causes stated in [article 50](#) of the Labour Code. The employer has to be certain there is enough proof to demonstrate that the employee's actions fall within any of the situations covered by the article. On the contrary, if the cause is not adequately demonstrated

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and the termination is carried out, the Labour courts will rule against the employer. In that situation, the employer will have to pay the severance amount, accrued vacations and accrued Christmas bonus and, in certain circumstances, unpaid wages if the plaintiff asks for them in the statement of claim.

Severance payments are calculated as follows: if the employee has a salary over US\$ 1,000.00 per month, the obligatory amount to pay will be the sum of four minimum wages per worked year. Currently, the minimum wage is US\$ 251.70 per month. However, if the salary is less than US\$ 1,000.00 per month, the obligatory amount to pay is one-month's salary per worked year.

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What happens when an employer uncovers employee fraud?

Fraud is just cause for termination; thus, an employer may terminate an employee immediately without liability (Art. 77(d) of the Labor Code). More specifically, although the employee does not have the right to severance pay (Art. 82 of the Labor Code), the employer must pay all inalienable benefits. The employee may dispute the termination in court within 30 days of the dismissal, in which case the employer will have to prove the fraud as just cause for the dismissal.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

There is no explicit requirement in Guatemala for an employer to conduct a formal investigation after uncovering employee fraud. As a result, there are no specific processes or rules that an employer must follow. However, for fraud to be considered just cause, the employer must have sufficient evidence and/or proof, e.g., documents, witness testimony, etc.

Although an employer may already have enough evidence without conducting a formal investigation, not doing so could result in the employer being unable to prove that fraud was the just cause for dismissal.

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Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

It is not necessary to have cause to dismiss an employee. Although an employer in Guatemala has the right to terminate an employee without cause, it may have to pay severance as a penalty in an amount equivalent to the monthly salary for each year the employee has worked for the employer, without any limit.

If a Labour Court finds that an employer has dismissed an employee illegally or abusively, the employer may be forced to pay one or more of the following to the employee: all pending benefits, severance, damages (with a cap of 12 monthly salaries), and court costs.

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What happens when an employer uncovers employee fraud?

According to Honduran Labor Law, an employer can dismiss an employee for fraud only if there is a judgment, and the Court establishes that the employee in fact committed the fraud. If there is no judgment, the employee cannot be dismissed.

If an employer uncovers a fraud and wants to dismiss an employee immediately, the process is as follows:

- 1) The employer appoints the employee to a hearing at least 24 hours in advance.
- 2) The employer holds a hearing, during which the employee must explain his/her actions.
- 3) After the hearing, the employer can dismiss the employee without arguing fraud. The employer must instead argue that the employee performed wrongly and did not follow the principles and rules of the company. After the labour dismissal, the employer can start a penal process.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

Before making any decision to dismiss an employee, the employer must conduct an investigation to collect any evidence and prove there is a legal cause for the dismissal, making certain not to violate any of the employee's fundamental rights in the process. The employer can access computers and phone records that belong to the company because it is understood that all employees are to use this equipment only for work purposes. Proof of the fraud or any other felony has to be obtained and documented in an affidavit, which should state all of the facts found, as well as the names of all of the people involved in collecting evidence of the fraud. The risk of not following the proper procedures of an investigation will likely result in an unfair/illegal dismissal, and the employer will need to pay full severance to the employee.

Is it necessary to have a "cause" in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Yes, it is necessary to have a cause established by law to dismiss an employee. The consequence of an illegal or abusive dismissal gives the employee the right to bring a claim to the Labour Court. If the employee proves such acts and wins the claim, the employer will have to pay the severance, indemnization, acquired rights (earned by the Honduran law), and all lost wages. Furthermore, the employee can claim the reinstatement of his/her previous position.

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What happens when an employer uncovers employee fraud?

If the fraud is employment related, the consequence could lead to termination with cause.

However, since the employer bears the burden to prove any allegation that it may state in the event of an eventual conflict or appearance before a Conciliation and Arbitration Board (Labor Authority), it is very important to properly document and objectively evidence the alleged fraud. Thus, the employer will likely need to conduct an investigation and prepare a detailed report.

Once the employer has proof that an employee committed a fraud, the employment relationship can be terminated with cause. The employer should then provide the employee with the corresponding notice describing in detail the reasons for termination. The notice can be delivered directly to the employee or through the Conciliation and Arbitration Board within five business days following the separation.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

There are no specific rules or processes to follow when employers or their external experts conduct an investigation. However, to avoid data privacy breaches, it is advisable to carry out the research only through public records and within devices provided by the company.

If an investigation is not done properly or is not conclusive enough to provide material evidence of the alleged fraud, it will not have sufficient probatory value within an eventual proceeding. Thus, the investigation should not include allegations that cannot be properly evidenced.

Once the final report is completed, the employer has 30 calendar days to carry out the termination with cause. If this time period elapses, it is deemed that the employer chose not to exercise its right to separate the employee.

Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Yes. An employee in Mexico can only be terminated by the employer with cause to avoid triggering the need to pay severance. Otherwise, if there is no legal cause, employers can still dismiss an employee to the extent that their legal severance is covered as a result.

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If the Conciliation and Arbitration Board rules that an employee was actually subject to a wrongful dismissal, or the employer fails to evidence the alleged termination causes, the Board would order the employer to pay severance plus lost wages.

As a result, prior to terminating an employee it is important to carry out an assessment on whether the alleged misconduct or fraud can be evidenced or not.

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What happens when an employer uncovers employee fraud?

The employer must request the employee's suspension before the Labour Ministry (MITRAB) and present the claim before the National Police. In case the employee is found guilty, the employer can proceed to pay the severance. In case of absolution, the employee must be reintegrated to work and the employer must pay all the salaries the employee stopped receiving during the suspension period.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

In Nicaragua, there is no established process that employers should follow when conducting an investigation. Instead, employers follow their established internal procedures, which must not violate any of the employees' labour rights.

If an employee is able to demonstrate that his/her labour rights were in fact violated, the employer can receive an administrative sanction from the Labour Ministry. Such sanctions will be according to the employer's income and field of work.

Is it necessary to have a "cause" in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

It is not necessary to have a "cause" in order to dismiss an employee. [Article 45](#) of the Labour Code allows employers to dismiss an employee without any cause. There are cases, however, where employees demonstrated that they were illegally dismissed and the labour courts commanded their employer to reintegrate them and pay all the salaries they stopped receiving during the suspension period.

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What happens when an employer uncovers employee fraud?

Fraud is a broad term, and can present itself in many different ways in the workplace. Situations where fraud may be involved require that the employer proceed carefully, assess the risks, and consider the possible legal ramifications.

Hence, it is necessary to conduct an investigation to reveal all of the relevant facts and legal implications so that the employer can make a fully informed decision as to how to proceed. The investigation must take into account legal provisions of employment, criminal, civil, and privacy practices, among others.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

All investigations should begin with a work plan that defines the topic and scope of the review, the tasks to be performed, the timeline, and the expected method of reporting. The investigation may be local or cross-border, which implies that the employer may have to deal with legal provisions of different jurisdictions when conducting the investigation.

The steps in the investigation will depend on the particular circumstances. Generally, the work plan should include document collection and review, interviews, experts' opinions (e.g., forensic accountants, finance, IT experts, or other consultants), and a report of the review's findings.

During the investigation, the employer must abide by the principle of procedural fairness or due process, which basically implies that the accused employee has the right to defend him/herself at all times. This also implies that the employer must comply with its own internal rules and procedures, which are usually reflected in the internal workplace regulations (companies with more than 100 employees must maintain internal workplace regulations that establish the rights and obligations of the parties, such as disciplinary rules and procedures).

Likewise, an employer must be careful not to violate an employee's right to his/her reputation, which can occur when an employer publicly accuses an employee of committing fraud, while the investigation is still underway.

The employer must also take into consideration the employee's rights to privacy, secrecy, and inviolability of private correspondence, communication, and documents – especially when accessing the employee's email, including but not limited to corporate email.

If the employer determines misconduct on the part of the employee, it must impose any disciplinary action within a reasonable period of time after concluding the investigation. Otherwise, a judge may decide that the disciplinary action was untimely and, therefore, invalid.

If the employee fails to comply with these rules during the internal investigation, the employee may challenge the dismissal before a Labour Court to render any disciplinary action ensuing from the investigation invalid.

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Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Yes. Employees in Peru can only be dismissed from their job for a just cause under the law (e.g., grave misconduct, deficient performance, conviction of a criminal offense, etc.).

Once an investigation has been completed, disciplinary action may be taken against an employee, including a dismissal. Naturally, the employer will need to have compelling evidence that the employee committed fraud – or another grave offense – for the dismissal to be valid under the law.

Fraud against an employer is considered a just cause for dismissal and can be channeled in many different manners under the law. However, fraud usually signifies a breach of the duty of good faith, i.e., the employee’s duty to act diligently, faithfully, and honestly toward his/her employer. Additionally, it may be considered a grave violation of the internal workplace regulations and other Codes and policies of the employer, which is also a just cause for dismissal. Depending on the circumstances, fraud may encompass one or more of the following causes for dismissal: completed or frustrated appropriation of assets or services of the employer; the use or delivery to third parties of the employer’s privileged information; theft or unauthorized use of company documents; false information provided to the employer with the intention of causing damage or obtaining an advantage, among others.

The employer must follow a simple internal procedure to dismiss an employee. No public authority needs to be involved and no authorization is required. This procedure lasts approximately six calendar days and is basically oriented to give the employee the right to defend him/herself.

If the employer fails to prove the employee’s involvement in the fraud scheme or breaches the principle of due process or privacy during the investigation, the employer may be exposed to contingencies. In addition, the employee may challenge the dismissal before a Labour Court to obtain either reinstatement in the job or an indemnity for arbitrary (unfair) dismissal.

The amount of the indemnity is calculated according to the following:

- Indefinite-term employees: 1.5 monthly salaries per year of services.
- Fixed-term employees: 1.5 monthly salaries for every month remaining in the employment contract.
- In both cases, the indemnity is subject to a cap of 12 salaries.

A trend to grant an additional indemnity for moral damages is currently quickly spreading at the labour courts. Thus, if an employee proves that he/she suffered additional distress during the dismissal, the employer may also be exposed to damages.

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What happens when an employer uncovers employee fraud?

If there is no mechanism set out in the policy of a company or no negotiated process to follow with a Union via a Collective Agreement, the employer could discipline the employee, which can consist of a written warning, suspension, or dismissal for “notorious misbehavior,” where the employee is not entitled to receive the severance payment.

An employer may suspend an employee for a maximum of 15 days as a “preventive” measure. This provides the employer additional time to investigate the circumstances and detect – on the basis of suspicion of fraud – whether the irregular facts or behavior can determine responsibility, and then apply disciplinary measures accordingly.

If the employer exceeds this 15-day period, the labor relation is terminated by dismissal, and the employee has the right to receive severance payment.

If there is a policy of the company or a Collective Agreement, the procedures laid down therein have to be followed.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

There are no specific regulations in Uruguay regarding the steps to be accomplished or conditions that must be fulfilled to carry out an investigation. There are, however, general limits that must be respected while the investigation takes place so that any ongoing efforts do not, for example, adversely affect the dignity or morale of the employee. Further, if during the investigation the fundamental rights of employees are violated, in particular the right to human dignity and privacy, damages can be claimed to the company. It is always advisable during an investigation to listen to those employees denounced on charges of fraud. If there is a procedure in place and it is neither respected nor implemented, the dismissed employee can claim damages to the company.

Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Uruguay has not ratified the Convention No. 158 of the ILO concerning termination of employment. Thus, employers have the right to dismiss employees at any time without the need for any justification or motive.

Any time an employer decides to dismiss an employee (either with or without motive) the employer must pay the employee a severance payment. The only exception is if the worker has incurred what is locally called “notoria mala conducta.” Literally translated, this concept means “notorious misbehavior.” It is a legal creation, but the actions that might be considered “notoria mala conducta” are a matter of judicial interpretation and, thus, there is no definition or single interpretation.

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A few examples of what may be considered severe misconduct whose occurrence alone may configure “notoria mala conducta” include:

- A crime committed against the company or any of its managers or workers.
- Fraud, sabotage, or deliberate damage.
- Deliberate poor performance.
- Repeated disobedience, insulting or similar.

Severance payment, commonly referred to as IPD (Indemnización por Despido), is equal to one monthly remuneration (salary plus other benefits) for each year or fraction of work at the company, with a maximum of six years.

In some cases, Uruguay law grants the dismissed employee the right to receive a special dismissal indemnity. This is the case for dismissal during maternity, sickness, and labour accidents, in which the employee is given a higher dismissal indemnity. If a dismissal is based on grounds that are not related to the employment, it can be considered abusive. In such a case, the employee may claim a special compensation. Even though the amount of this compensation is not established by law, jurisprudence generally dictates that it should be in an amount double or triple the severance payment.

If the dismissal is a result of an employee’s participation in the Union or in union-related activities, the employee is entitled to file a claim before the Labour Courts requesting that the dismissal be nullified and that he/she is paid the salaries he/she did not receive during the time between the dismissal and any effective reincorporation. The Court will ultimately decide if the worker must be reincorporated and paid said salaries.

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What happens when an employer uncovers employee fraud?

When an employer uncovers employee fraud, the employer has the option of terminating the employment contract for justified cause, but only with prior approval from the Labor Ministry. The employer needs to have sufficient evidence to prove the fraud in order to persuade the Labor Ministry to approve the termination.

The dismissal process begins by presenting an application to the Labor Ministry requesting approval to terminate the employee for cause. The employee can then file an answer challenging the application. The Labor Ministry will open a discovery process whereby the parties will have eight days to present their evidence and then an additional two days to present their conclusions in writing, after which the Labor Ministry will have 10 days to make a determination.

These various steps appear to be very simple in writing, but the reality is much different. The dismissal process requires giving notice to the employee, which in turn requires a bureaucratic process that can take months and even years. Even if the process moves normally, the Labor Ministry may still take years to make a decision, despite the rule requiring it to do so within 10 days. During all this time, the most the employer can do is suspend the employee with pay.

Given how burdensome the dismissal process is, employers may instead want to confront the employee and present him/her with the evidence of fraud so that the employee resigns to avoid further embarrassment.

It is important to point out that executive management employees are not protected against termination without cause and therefore can be terminated at any time, with or without cause, without having first seeking approval from the Labor Ministry.

What process and rules should employers follow when conducting an investigation; what are the risks when they don't?

There are no specific rules in Venezuela for conducting internal investigations. However, when conducting such an investigation, an employer should ensure that any evidence it uncovers can later be used in trial. Thus, all evidence that will be presented should be obtained under ordinary and legal channels, for example, properly placed security cameras, company emails, audits, invoices, etc. The employer should not use any information that is confidential or strictly the property of the employee unless the employee has provided his/her consent to do so.

In addition, internal investigations – and the decisions resulting from them – should be open to the affected employee so that his/her constitutional due process rights are guaranteed. In other words, internal investigations should still follow the due process principles provided in the Venezuelan constitution.

If an employer uncovers evidence illegally or through other misguided means, the evidence will not be admissible in the application process before the Labor Ministry, and the Labor Ministry will likely decide in favor of the employee, thereby denying the application for termination.

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Is it necessary to have a “cause” in order to dismiss an employee? What are the consequences if a Labour Court finds a dismissal to be illegal or abusive?

Yes, it is necessary to have cause to dismiss an employee, with the exception of executive management employees. If the Labour Court finds a dismissal illegal or abusive, it or, in this case, the Labor Ministry will immediately reinstate the employee to his/her former job position.

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