David Weisenfeld:
I’m David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

With all of the fireworks surrounding the current political climate in the early days of a new administration, some big employment changes in a major US territory may have flown under your radar screen. But if your company does any business in Puerto Rico, or is even thinking of doing so, then this podcast is an absolute must listen.

That’s because Puerto Rico has instituted a host of employment law changes that dramatically alter the landscape on the traditionally pro-employee island.

These changes favor employers in a number of areas and merit a much closer look. So we’ll do just that with Littler Global employment attorney Shiara Diloné, who joins us by phone from her office in San Juan. Shiara welcome.

Shiara Diloné:
Hi, hola!

David Weisenfeld:
Hola, it’s great to have you with us, and Shiara is my depiction accurate that the employment laws in Puerto Rico up until this point had generally favored employees? [0:01:23:0]

Shiara Diloné:
Well, first of all thank you for contacting us. You are right. Puerto Rico for the most part has been an extremely pro-employee jurisdiction. We’ve had many pro-employee statutory benefits for more than 50 years. The United States now is recently going to accrual of vacation and sick leave. Well we’ve got that for the last 50 years, so we have been for the longest time an extremely pro-employee jurisdiction.

David Weisenfeld:
And getting to the changes, one that’s certainly caught my eye is that it will now be much easier to fire a newly-hired employee who isn’t working out since the nine-month automatic probationary period has been instituted for new hires who are non-exempt. What can you tell us about that? [0:02:11:01]

Shiara Diloné:
Because Puerto Rico is not an at will jurisdiction, we do have an Unjust Dismissal Act. It’s extremely important for employers to be
able to place employees on probationary employment contracts. And one of the Act's most significant changes is that probationary periods are now automatic. Before, you needed written agreements, that is no longer required.

Another important thing is that before, contracts were a maximum of three months, now you have up to 12 months for employees that are classified as executives, administrators and professionals under the Fair Labor Standards Act, and all other employers have a nine-month probationary period. Definitely an advantage, it provides the employers with the opportunity to actually evaluate the performance of the employee before actually deciding if that employee is going to become a regular employee subject to all the statutory benefits.

David Weisenfeld: I know it used to be that there was no cap on severance pay in Puerto Rico, but now that's been capped at nine months. We were chatting yesterday and you saw that as fairly significant. Tell us why?

Shiara Diloné: I think that the most noteworthy aspect of the amendments of this new law is probably the changes to the formula of the statutory severance, or what any employer that has business in Puerto Rico knows is called Mesala in Spanish.

The formula before for the severance was based on the years of service and the highest salary of the employee. And the way that it was enacted, basically, an employee that had been working for more than 15 years with the company had a right to six months' pay plus three weeks per completed year of service. That meant that in some scenarios you had employees that had more than a year and a half, two years’ worth of severance.

So, obviously when you were going to terminate an employee, you really had to consider the liability assessment of this severance. Now, the amount is capped at nine months. So definitely that is a great advantage for most employers.

Another very good thing, not only is the cap under this new law, but before that law had a statute of limitation of three years and that was changed to one year. So, that is definitely an extreme advantage for employers, and one that many of the companies with operations here in Puerto Rico are definitely happy about.

David Weisenfeld: And that severance pay to which you refer, that applied for any employee not just those who had employment contracts. Correct?

Shiara Diloné: That is correct. The Act 80 applies basically to all employees unless the employee is hired for a definite period of time. If the employee is hired for a specific amount of time, then it becomes an issue of a breach of contract claim, and not necessarily an issue of unjust dismissal. But the law is applicable to both exempt and non-exempt employees.

David Weisenfeld: Shiara, what other changes jump out at you as the most notable among these new laws?
Shiara Diloné: Well, probably we would have to understand a little bit where our government is coming from. It is no secret that Puerto Rico has been going through some very tough economic times. So, what the government was looking for was to flexibilize our laws to somehow make it more attractive for companies to actually come to Puerto Rico.

So, it's no surprise that the most significant changes are to employee benefits. In terms of the accrual of vacation for example was dramatically reduced, the amount of Christmas bonus was dramatically reduced. For the Christmas bonus, employees needed to work at least 700 hours during a one-year period starting in October 1st until September 30th of the next year. And that amount was now almost doubled to 1,350 hours. And not only was that amount increased, but the amount of the bonus was reduced.

So, most of the changes are precisely changes aimed at reducing the amount of benefits that employers need to pay for newly hires because that is extremely important, that we all know. Many of these changes are only applicable to employees hired after the effective date of the law, which is January 26, 2017.

David Weisenfeld: Again, we are speaking with Littler Global employment attorney Shiara Diloné, of the firm’s San Juan, Puerto Rico office. Shiara, it sounds like from what you're saying that the hope here is that these employment law changes will stimulate more investment and companies doing more business in Puerto Rico? [0:07:10:5]

Shiara Diloné: That is the way that at the very least the government is looking at this completely overhaul of our employment laws. There are many people that have referred to Puerto Rico as a California on steroids. We do have a lot of regulations when it comes to wage and hour, very similar in that regard to California. We have what we mentioned before, The Unjust Dismissal Act.

But we do have anti-discrimination statutes that include double damages, reinstatement. It is an extremely pro-employee jurisdiction that was not necessarily something that attracted new business to come down to Puerto Rico.

So, this is a way of us saying, 'Hey, it's not as difficult, and it is not as expensive to do business here.'

David Weisenfeld: Well you just mentioned wage and hour, and certainly those are issues that always attract attention in the US as fertile ground for litigation. So talk a little bit about how Puerto Rico changed the law here in terms overtime pay? [0:08:14:9]

Shiara Diloné: Well, to the extent that the Act's intention was to make employment laws more flexible it is not surprising that many of the amendments are geared towards Puerto Rico Working Hours and Days Act. The amendments were geared towards redefining the concept of overtime hours and for those employers that have operations here, they do know that we have daily overtime, 24-hour overtime and weekly overtime.
So, what the new statute basically did was it repealed the provision that defined overtime as any hours worked in any period of 24 consecutive hours. So we no longer have that 24-hour overtime, and that is extremely favorable to employers. Because, to those that are not familiar with 24-hour overtime, that meant that you maybe had an employee that was working eight hours on a Monday and was also working eight hours on a Tuesday, and still had one-hour overtime because of the time that they went in.

Let's say that they worked and started working on Monday at eight o'clock in the morning, but on Tuesday they started working at seven o'clock in the morning. There are less than 24 hours and that meant that the employee had one-hour overtime.

So, again aiming at being more flexible, this new law completely repealed that section. We still have daily overtime. We still have weekly overtime, but in this respect one of the other main changes was that our closing law, which provided for special compensation for employees working in the retail industry on Sundays, that law was repealed too. So now it's a regular working day.

David Weisenfeld: Independent contractor issues have been a contentious issue as well. Do the Puerto Rico employment law changes affect whether individuals are considered independent contractors versus say employees? [0:10:16:1]

Shiara Diloné: Well, there used to be a lot of litigation in that regard. And particularly again, because employees were entitled to so many statutory benefits, we had many cases of independent contractors saying, 'We truly are employees.' So, in an effort to provide a higher degree of certainty regarding the existence or not of an employee-employer relationship. The Act basically establishes a presumption that an individual is going to be an independent contractor if he or she complies with certain, like a test.

One of them for example is if that person owns or has requested an employer identification number or an employer social security number. If the person files income tax returns claiming to own a business, if their relationship has been established through a written agreement, provided that they comply with certain criteria, they are automatically going to be considered independent contractors.

So it's a big change from what we had before. We did have case law from our Supreme Court that more or less established these parameters, but now it is established under the law. It is important though to understand the fact that, under this new definition, a person may be considered an independent contractor for purposes of Puerto Rico law does not mean that that person is going to be an independent contractor under the Fair Labor Standards Act or under the Federal Insurance Contributions Act for FICA purposes because the standards are a bit different.

David Weisenfeld: I liked your reference earlier that Puerto Rico employment law had been like California on steroids. With these changes, how would you characterize it now in terms of on the pro-employee, pro-employer spectrum? [0:12:07:1]
Shiara Diloné: I think that it's too soon to tell. We do think that these changes make it more balanced. Obviously, shows the willingness of the government to try to promote businesses to come to Puerto Rico to hire employees, and certainly makes things easier for companies to do so.

There are still challenges, of course, because since the law only applies to newly-hired employees, current employers need to be wary of the fact that if they do take advantage of these new changes, they're probably going to have to make changes to their payroll systems because the current employees are grandfathered on their benefits. So you're going to have employees that are on two completely separate sets of benefits and, accordingly, separate payroll systems.

So, yes there are a lot of advantages. There are some challenges. But we do believe that at the end it's going to end up being an extremely positive thing for our country and definitely for businesses wanting to either establish business in Puerto Rico or grow their business in Puerto Rico.

David Weisenfeld: And what's been the reaction among employees and unions in Puerto Rico? [0:13:21:7]

Shiara Diloné: Well, let's just say they have not been very happy at all. They didn't have a lot of time in order to process. Our new governor was sworn in on January 2nd, and within a week and a half he presented this piece of legislation, and it was approved within another week and a half.

Precisely because it was fast-tracked, employees and unions didn't have too much time in order to complain about the changes. But they have certainly voiced their objections to many of these changes and again, this is something that companies need to be aware of, because we do not have in Puerto Rico that much union activity in the private sector, and a lot of employers obviously start taking advantage of these new provisions. It may generate union activity in many of these private employers.

David Weisenfeld: Sounds like that will be interesting to watch to say the least. So, as we wrap up Shiara, what would be your number one takeaway to leave with the audience in terms of what employers need to know with these changes? [0:14:30:6]

Shiara Diloné: Well, I think it is extremely important that employers decide what changes they truly want to incorporate into their businesses. More than the cost of doing business, it's an issue of employee morale, it's an issue of standards within the community, and once they make those decisions that they take immediate action in order to amend their handbooks, their policies.

There are a lot of employee handbooks that include provisions with respect to their probationary periods to Christmas bonus. So, there are a lot of policies that should be amended fairly quickly if companies are going to take advantage of these new changes.

David Weisenfeld: And all of the changes are already in effect? I know that you mentioned they were passed in January. [0:15:18:9]
Shiara Diloné: They were passed in January and the effectiveness was immediate. So, all of these changes became effective on January 26th of this year.

David Weisenfeld: Okay, well we'll let that be the last word. Shiara Diloné practices with Littler Global's San Juan office where she represents employers in a broad range of matters. Shiara thanks so much for bringing everyone up to speed on the many changes in Puerto Rico employment law.

Shiara Diloné: Thank you.

David Weisenfeld: I'm David Weisenfeld. We hope you've enjoyed this podcast. Continue checking our website regularly for more podcasts on key employment-related issues including, Why Background Checks Pose a Catch 22 for Employers.

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