

AUGUST 23, 2023

Advance severance payments to garment workers in El Salvador

THE ISSUE

How should FLA affiliates correctly implement the practice of providing advance severance payments to garment workers in El Salvador?

BACKGROUND

In El Salvador's garment sector, employers frequently pay workers an additional month's salary per year, labeled as an advance severance payment. Employers are not required by Salvadoran law to provide these payments in advance. However, employers see this practice as a way to reduce the risk of being unable to pay the legally required severance that would normally follow termination without cause. This risk is especially high in cases of mass layoffs or unexpected factory closures, which happen frequently in El Salvador.

According to Article 58 of the Salvadoran Labor Code, when an employer terminates an employment relationship without cause, the employer must pay the worker severance (*indemnización*). Workers are entitled to one month's salary for each year of employment. The law does not prohibit advancing severance payments. In addition, Article 38, No. 11 of the Salvadoran Constitution states that employers are obligated to pay severance in accordance with the law to workers who they terminate without cause.

Despite the constructive intent behind these payments, the inclusion of advance severance payments in worker paychecks has caused confusion and questions about their efficacy since the practice is not predicated on existing law or regulation.

Workers and unions support these payments, as because workers feel like they are receiving an additional month's salary. However, because many workers' incomes are insufficient to fulfill their basic needs, these workers use the advance payment to meet their current financial obligations rather than saving the money in case of termination. Through monitoring labor conditions at factories and investigating allegations of persistent and systemic labor violations from Salvadoran union organizations, FLA has identified cases of non-compliance with national regulations and the Workplace Code of Conduct and Compliance Benchmarks in connection with advance severance payments.

Three key issues are:

1. [Incorrect final severance payouts](#)

In a 2021 SCI assessment at a supplier in El Salvador, FLA found that the “factory pays workers advance termination payouts every three years; such payments are not included as itemized deductions in the final severance calculation when workers are terminated...” When this factory terminates a worker, the final severance calculation is based on multiplying the years or fractions of a year counted since the last time the factory advanced the severance payment to the worker until the date of their dismissal by the contracted basic salary at the time of the termination.

The calculation used does not comply with Salvadoran law or FLA’s Compliance Benchmarks. It [reduces](#) the total amount of termination payouts workers are legally obligated to receive. FLA recommends as an immediate action to “calculate the final severance payment of termination payouts by multiplying the total length of service for the last valid legal minimum wage in force and deduct from the total all in-advance payments of termination payouts provided to the workers in previous years.”

2. [Unlawful agreements to avoid paying full severance](#)

According to the Principle of Inalienability of workers’ rights established in the Salvadoran Constitution and Labor Code, workers cannot waive their labor rights.¹ Therefore, any negotiation or settlement between an employer and workers that reduces the final amount of a worker’s legally-entitled severance contravenes the law.

In 2018, the Union of the Textile, Similar and Related Industries of El Salvador (*Sindicato de la Industria Textil, Similares y Conexos de El Salvador*, SITSCES) filed a Third Party Complaint ([TPC](#)) alleging labor violations at a supplier to certain FLA companies. Part of the TPC concerned the factory’s practice of advancing workers’ severance payments on an annual basis. SITSCES alleged the factory only provided 70% of the severance due.

The TPC investigation revealed that the factory had an agreement with two other unions (not including SITSCES) noting that workers who wanted to receive an advance severance payment annually could do so by agreeing to be paid 70% of their total severance amount and forfeiting the remaining 30%. When these workers were later dismissed, no additional severance was paid by the factory. In 2019, FLA conducted [an SCI assessment](#) at this factory and confirmed workers still had the option to receive only 70% of their annual termination payouts in advance and forfeit the remaining 30%.

3. [Opaque documentation and inequitable criteria](#)

Lawyers for many employers in El Salvador have recommended documenting workers’ advance severance payments as a termination. Under this structure, workers must sign a settlement letter every time they receive the advance payment, stating the employment relationship has ended even though workers are not terminated and continue working at the factory.

Because the employers document this practice as a termination, they also in some cases decide

¹ El Salvador Constitution articles 38 (section 11) and 52; Labor Code article 58.

that workers who are entitled to special protection and cannot be dismissed without previous authorization from a labor authority (e.g., union officials, pregnant and lactating workers, or workers with chronic medical conditions) must be excluded from receiving advance severance payments. While the employers might believe they are protecting the rights of this special category of workers, the affected workers and the union organizations representing them believe this non-payment of advance severance is discriminatory.

SUSTAINABLE REMEDIATION EFFORTS BY FLA AFFILIATES AND UNIONS IN EL SALVADOR

Remediating these issues is challenging for FLA companies because many Salvadoran suppliers resist review of their policies and practices concerning advance severance payouts. The lack of clear government regulation or guidance appears to keep Salvadoran employers from making changes to their advance severance payment practices.

An FLA Participating Company sought clarification from the Ministry of Labor and Social Welfare (*Ministerio de Trabajo y Previsión Social*, MINTRAB) in September of 2019 on the correct calculation of a worker's final severance payout when a worker has received advance severance payouts and then is terminated without cause. MINTRAB responded as follows:

1. El Salvador's Labor Code does not refer to advancing severance payment to workers since it only recognizes the payment of an "indemnización" at the time the worker ends the employment relationship with their employer without just cause.
2. The payment in advance made by the employer is a benefit linked to the payment of the employer's labor liabilities, but is not a severance payment, as the "indemnización" only applies in the case of an unjustified dismissal based on article 58 of the Labor Code.
3. For calculation purposes, the last salary earned by the worker on the date of the termination must be taken.

In June 2019, the Federation of Independent Associations and Unions of El Salvador (*Federación de Asociaciones y Sindicatos Independientes de El Salvador*, FEASIES) also consulted with MINTRAB regarding a specific factory case. FEASIES asked MINTRAB for its legal opinion on whether a special category of workers should be entitled to receive their severance payment in advance, as was the practice at the factory. MINTRAB stated that any advance payment aiming to maintain job stability of workers with a special legal protection could be considered a good practice; not paying this benefit to these workers could be a limitation if the factory voluntarily pays this benefit to the rest of the workforce.

FLA RECOMMENDATIONS

FLA affiliates should comply with local laws and FLA's Workplace Code of Conduct and applicable Compliance Benchmarks throughout workers' employment, including termination. In addition, FLA also recommends that affiliates should:

- Support their Salvadoran suppliers in ensuring clear communication and training regarding advance severance payments. This process should include consultation with workers' representatives.

- Encourage suppliers that provide advance severance payments to review their policies and procedures concerning termination and retrenchment so that they remain in compliance with FLA's Code and MINTRAB's legal opinions.
- Ensure that suppliers manage advance severance payouts as an advance of their labor liabilities and not as a dismissal. It should be voluntary for workers to accept these payouts.
 - When its implementation results from a bargaining process or collective agreement or settlement with workers' representatives, the advance payments should never limit workers' legal rights.
 - Advance payments should be made on a nondiscriminatory basis, and non-payment should not be used as a disciplinary measure.
- Work with their suppliers to review the calculation criteria for advance severance payments and ensure the final severance payment, at the time of termination, is calculated in compliance with Article 58 of the Labor Code. The total amount the employer has already advanced should be deducted from that sum, in compliance with FLA Benchmarks concerning Termination and Retrenchment.
- When there is a supplier policy or settlement between employers and workers that limits workers' rights, it must be ended immediately and FLA-affiliated companies should ensure all workers are being paid full severance when they are terminated without cause, even if a worker has "voluntarily" signed an agreement renouncing full compensation.

APPENDIX 1: FLA CODE ELEMENTS

EMPLOYMENT RELATIONSHIP BENCHMARKS

ER.15.3 Employers shall not demand that workers sign any declaration of good health, waivers or releases of other rights as a condition of receiving severance pay or other legal benefits* from the company, and shall not threaten to withhold benefits if workers do not sign.

ER.15.4 Upon termination, severance shall be based upon the worker's current salary and seniority as calculated from the initial date of hire.

ER.15.4.1 Where employers provide advance termination payouts as allowed by law, these amounts may be subtracted from the final severance payment but must be included as itemized deductions in the final severance calculation.

ER.15.5 Where employers provide annual indemnization, original contracts should remain without being terminated.

COMPENSATION BENCHMARKS

C.11.1 Employers shall comply with all national laws, regulations and procedures concerning the payment of compensation to workers.

C.1.2 In any case where differences or conflicts in national law and FLA Workplace Code arise, employers are expected to apply the highest standard.



MINISTERIO DE TRABAJO
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APPENDIX 2: MINTRAB'S LEGAL OPINION ON THE CALCULATION OF SEVERANCE PAYOUTS AT THE TIME OF A TERMINATION WITHOUT JUST CAUSE

Ref: DGT-HC-006-EXT-2019
San Salvador, December 16, 2019

In response to your letter received on October twenty-nine of the present year, in which you submit a request to issue an opinion regarding the severance payment a person working at an institution should receive at the time of their termination without just cause. Two questions arise, detailed and addressed below:

1) Should the calculation of the severance payment be made on the basis of the salary that the employee is earning at the time of the unjustified dismissal?

As established in the Constitution of El Salvador in Article thirty-eight, "*Labor shall be regulated by a Code whose main purpose will be to harmonize relations between employers and workers, establishing their rights and obligations. It shall be based on general principles aimed at improving the living conditions of workers, and shall include in particular the following rights...*" Section eleven "*An employer who dismisses an employee without just cause is legally bound to compensate him/her in accordance with the law.*" Therefore, it can be determined that this is a right based on the Constitution of the Republic; accordingly, Article fifty-eight of the Labor Code establishes the following "*When a worker hired for an indefinite term is dismissed from a job without just cause, the worker shall have the right to be compensated by the employer with an amount equivalent to the basic salary of thirty days for each year of service and proportionally for fractions of a year. In no case shall the severance payout be less than the equivalent to a basic salary of fifteen days.*" For the purpose of severance payment, the last salary earned by the employee on the date on which the dismissal took place is applied.

2) In case an employer has paid severance in the years prior to the unjustified dismissal and there has been an increase to the worker's salary, should the employer pay the severance supplement for those years on the basis that at the time of termination, the employee was earning a salary greater than that earned in the years for which the severance was advanced?

Based on your inquiry, the Labor Code does not refer to advance payment of severance since it only recognizes the payment of severance at the time when the employee has been dismissed without just cause. Therefore, the amount paid in advance is a benefit provided to the worker in reference to the payment of labor liabilities, but not in reference to severance, since it applies only in the case of an unjustified dismissal as set forth in Article fifty-eight of the Labor Code. However, Article six of the Law Regulating the Economic Benefit for Voluntary Resignations addresses the payment of a yearly benefit, but the supplement only applies in cases in which the legally applicable benefit has not been paid.

Without anything further at present.
Sincerely,

[Signature] [Stamp]
Emigdia Mayari Merino Garcia
Labor General Director

NOTE: The present is a non-binding illustrative opinion based on the information provided in the request and is in no way intended to resolve any particular case, but rather to provide an illustration for a better application of labor standards.

ABOUT FAIR LABOR ASSOCIATION

Fair Labor Association (FLA) promotes human rights at work. We are an international network of companies, universities, and civil society organizations collaborating to ensure that millions of people working at the world's factories and farms are paid fairly and protected from risks to their health, safety, and well-being.