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Employers in El Salvador's Obligation to Pay Medical Leave

THE ISSUE

Are Salvadoran employers obligated to pay – as a subsidy – the first three days of medical leave?

BACKGROUND

Medical Leave Regulation and Practice

Some employers in El Salvador do not consistently pay for the first three days of a worker's sick leave, primarily because of a gap in El Salvador's legal framework. Article 307 of the Salvadoran Labor Code states that when the employment contract is suspended due to an employee's common illness or accident, the employer is obligated to pay the employee until the employee has recovered an amount equal to 75% of the basic contracted wage. A provision in the Salvadoran Constitution establishes employers' exemption from obligations to workers that are provided by secondary laws if those obligations are covered by the Salvadoran Social Security Institute (ISSS).¹ However, the ISSS daily subsidy for a worker on temporary medical leave does not begin until the fourth day of leave.² In consequence, who pays for an employee's one-, two-, or three-day sick leave is an unresolved question in El Salvador.

The Ministry of Labor and Social Welfare (MOL) has issued several case-by-case legal opinions, as requested by Salvadoran unions or union federations, and confirmed that employers are responsible for paying sick leave (that is three days or fewer) due to common illness. Moreover, the Labor Inspectorate has initiated administrative procedures and sanctioned employers who do not pay this benefit to workers. While an increasing number of factories are adopting an internal policy to pay workers for the first three days of medical leave, others have resisted the implementation of this practice.

For almost a decade, FLA has deemed the first three days of medical leave a required subsidy by the employer and documented non-payment of this subsidy as a non-compliance with FLA's Workplace Code of Conduct and Compliance Benchmarks either through [factory assessment reports](#) or [Third Party Complaint investigations](#). Unions in El Salvador have been more vocal and continue demand compliance with this legal benefit from employers, brands, labor authorities and local and international stakeholders.

¹ Article 50 of the Salvadoran Constitution.

² Article 24 of the Regulations for the Application of the Social Security System.

Ministry of Labor's Legal Opinion

A legal opinion from the MOL was essential in order for FLA to seek compliance from FLA-affiliated companies and subsequently from employers in their supply chain in El Salvador.

On May 22, 2018, three FLA-affiliated brands and the FLA's Civil Society Engagement Manager for the Americas met with the Minister of Labor and Social Welfare, Sandra Guevara; the General Director of Labor Inspection, Jorge Bolaños; the General Director of Labor, Mayari Merino; and the Sub-Director of the ISSS, Milton Escobar. The purpose of the meeting was to seek clear guidance from the Ministry regarding employer obligations with regard to social security contributions and whether or not employers are obligated to pay the first three days of medical leave.

On July 2, 2018, FLA received the written [general legal opinion](#) from the MOL stating that, "the employer is required to pay the first three days of medical leave for all workers in their employment."

The MOL has the authority to issue legal interpretation of labor regulations in the case of a conflict of law or doubt about the obligation.³ Therefore, legal opinions issued by the MOL – and specifically the general legal opinion dated June 26, 2018 – establish a binding obligation for employers in El Salvador to pay for the first three days of medical leave. As a result, FLA-affiliated companies sourcing from El Salvador and suppliers producing in El Salvador must enforce the implementation of the general legal opinion, which is effective immediately.

FLA RECOMMENDATIONS

FLA's engagement with FLA-affiliated companies toward the proper implementation of this practice at the workplaces in El Salvador has improved since the first version of this Issue Brief was posted and shared in 2018. In some cases, the brands' proactive intervention resolved issues related to payment of sick leave and avoided the need for an official Fair Labor Investigation. FLA recommends that companies:

1. [Monitor the supply chain in El Salvador](#). Determine which suppliers within the company supply chain in El Salvador have not already adopted the practice of paying workers for the first three days of sick leave. Inform the suppliers who have not about the employer's obligation to pay the first three days of sick leave, and work jointly with them to develop a corrective action plan.
2. [Update the factory's policies and procedures regarding sick leave](#). Ensure that the workplace clearly expresses their commitment to safeguard the right of all workers to be paid three or fewer days of sick leave and develop a procedure to exercise that right.⁴
3. [Training and communication](#). Ensure that the workplace clearly communicates and trains managers, supervisors, workers, and union officials on the changes in factory policies and procedures regarding sick leave, focusing on clear steps for requesting leave; approval by the supervisor or HR manager; calculation of the payment; and method of payment.

³ Article 8 (j) of the Law of Organization and Functions of the Labor and Social Welfare Sector.

⁴ Employers must pay every medical leave even if it is less than three days.

4. **Ensure workers receive 75% of their basic contracted wage.** Based on Article 307 of the Salvadoran Labor Code, the company should ensure that employers pay workers (at a minimum) 75% of their basic contacted wage for the first three days of sick leave. However, the best practice should be to pay the full amount.
5. **Refrain from applying any deduction to a worker's seventh-day payment or other cash benefits and apply all lawful/applicable deductions and contributions.** The first three days of sick leave are considered a legal absence from work, which means there should be no deduction applied to the seventh-day payment or other cash benefit in which the worker's attendance is a factor for the calculation and payment of such benefit.⁵ The amount received by workers is subject to the legal deductions corresponding to pension fund and social security contributions.⁶
6. **Prevent discrimination in the implementation of the policy.** The payment of the first three days of medical must be granted to all workers without regard to their performance, seniority, union affiliation, attendance record, etc. The exercise of this right to sick leave by the worker must not be used to discriminate or negatively affect the worker's employment status, including decisions concerning recruitment, termination, promotion, or assignment of work.

⁵ Article 171 Salvadoran Labor Code; worker's loss of Christmas bonus for unjustified absences from work. Art. 201, Salvadoran Labor Code.

⁶ Article 14 of the Law of the Pension Saving System and Article 3 of the Regulations for the Application of the Social Security System.

APPENDIX 1: FLA CODE ELEMENTS

EMPLOYMENT RELATIONSHIP BENCHMARKS

ER.1.1: Employers shall have in place written policies and practices and maintain proper and accurate records governing all aspects of employment from recruitment, hiring and probation, including written terms and conditions of employment, job descriptions, administration of compensation, and working hours for all positions, through to retrenchment and termination processes.

HOURS OF WORK BENCHMARKS

HOW.16: Employers shall provide workers with sick leave as required under national laws, regulations, and procedures.

HOW.17: Employers shall not impose any undue restrictions on sick leave. Any workplace procedures regulating sick leave (e.g., informing the employer as soon as possible, the provision of medical certificates) must be in line with national laws, regulations and procedures and must be communicated in full to all workers.

COMPENSATION BENCHMARKS

C.1 Employers shall comply with all national laws, regulations and procedures concerning the payment of compensation to workers.

C.7 All payments to workers, including hourly wages, piecework, fringe benefits and other incentives shall be calculated, recorded, and paid accurately.

C.21.1 Employers shall provide all legally mandated fringe benefits, including holidays, leave, bonuses, severance payments and 13th month payments to all eligible workers within legally defined time periods.

ABOUT FAIR LABOR ASSOCIATION

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