

Labor Reform under Act No. 27742 [*Ley Bases*]

By Julián A. de Diego¹

Act No. 27742, known as Bases and Starting Points for the Liberty of Argentines (LB, for its acronym in Spanish), contains the most important labor reform in 50 years since the Employment Contract Act was passed in 1975.

The LB is part of the labor reform proposed in Emergency Executive Order No. 70/2023, whose validity is still under debate, within the framework of the Court decisions that have stalled its validity or challenged its constitutionality; they were appealed by the General Prosecutor's Office acting as a Defendant.

The LB became effective on July 9, 2024 inclusive, making a distinction between operating standards (which apply immediately) and aspirational standards (requiring another rule for their validity) and standards subject to regulation (which are not operating until they are regulated). Sometimes, a law takes effect immediately, but some provisions need to be regulated.

- *First, this Act promotes Registered Employment, and repeals all fines for unreported employment, which proved ineffective in the fight against clandestine employment and caused undesired effects, significantly increasing the amounts claimed in labor disputes. It rolls out a new computer system, together with a moratorium, with innovative guidelines in terms of debt forgiveness, interest rates, and even criminal penalties, which will be included after it is regulated (see Section 75 et seq. LB) "Section 76 LB: Employers in the private sector may regularize those employees hired before the enactment date of this Act. Unreported and under-reported employees may be regularized."*

- *Additionally, it sets up a special regime of exceptions, exemptions, and relief, including a moratorium, which should be regulated. To this end, the Executive has a 90-day period from the effective date of this Act, i.e. July 9, 2024. "LB Section 77:*

¹ Julián de Diego is a Lawyer and Doctor in Juridical Science. He is Professor Emeritus at the School of Law and the School of Economic Sciences, and Director of the Postgraduate Course in HR Management at *Pontificia Universidad Católica Argentina*. He is a Lecturer at *Universidad Católica* in the Schools of Law, Economics and Business. He is a Full Academician and member of the Board of Directors of the National Academy of Moral and Political Sciences in Argentina, and a corresponding member of the Royal Academy of Moral and Political Sciences in Spain. He is also a Full Member of the National Academy of Education and a member of its current Board of Directors as a regular Auditor.

The Executive shall regulate the effects that regularizing employees will cause as described above. As a result, a) criminal prosecution under Act 27430 is no longer allowed, and any penalties, fines or consequences arising out of employees' regularization under Act No. 11683, consolidated text in 1998, as amended, Act No. 17250 as amended, Act No. 22161 as amended, Section 32 of Act No. 24557 as amended are now repealed, together with any social security fines under Act No. 24769 as amended; Act No. 25212 as amended, whether final or not, provided they are unpaid or pending on the effective date of this law; b) The Registry of Employers with Fines for Labor and Employment Matters (REPSAL, for its acronym in Spanish), established by Act No. 26940 is now eliminated for any breaches committed or verified before the effective date of this law, as long as they regularize all employees for whom they were listed on REPSAL and pay any fines that may be incurred; c) Debt forgiveness for capital and interest in the case of unpaid social security contributions as follows: (i) Argentine Integrated Social Security System, Act No. 24241 as amended; (ii) National Institute of Social Services for Retirees and Pensioners, Act No. 19032 as amended; (iii) National Health Insurance System, Act No. 23661, as amended; (iv) National Employment Fund, Act No. 24013, as amended; (v) National Family Allowances System, Act No. 24714, as amended; (vi) Contribution to the National Registry of the Construction Industry, Act No. 22250, as amended; (vii) Other labor or social security regimes to be determined by regulation. The rates of debt relief shall be regulated in due course but in no way shall they be below seventy percent (70%) of the owing amounts. Incentives and special benefits may be created for Micro, Small- and Medium-Sized Enterprises to pay off their obligations in cash".

"Section 78.- Regularized employees shall be entitled to compute up to sixty [60] months of services with paid contributions or fewer months for which they are regularized, as calculated on a monthly amount equal to the minimum living wage only in order to comply with the requirement of years of services under Act No. 24241 as amended to access the universal basic pension benefit or the unemployment benefit under Section 113 of Act No. 24013, as amended. The regularized months shall not be considered for the purposes of determining the PC benefit (for contributions made before June 30, 1994) or the PAP benefit (for contributions made after June 30, 1994). Section 79.- Employees shall be regularized within ninety [90] calendar days, as from the effective date of the regulation under this title of this Act. Section 80.- Any debts challenged at Court or administrative agencies on or before the publication date of this Act in the Official Gazette may be regularized as long as employers abide by the respective decision or where appropriate, waive any course of action, including any appeals, and pay filing costs and other expenses. Employers may abide by the respective decision or abandon any course of action, whether in whole or in part, at any administrative

or judicial stage, as appropriate. Section 81.- The Tax Authority (AFIP) and the social security agencies with their own or delegated powers shall refrain from determining debts ex officio, issuing notices of violation for the same reasons and for the same periods for regularization, and establish tax increases as a result of employment regularization under this Title.”

- *The repeal of fines is very broad, since the law eliminates all penalties related to unreported or under-reported employment (see Section 99/100 LB).*

- The following Sections are repealed: Sections 8-17 and 120, subsection a) of Act No. 24013 about fines *for irregular registration, false or later start date, unreported or under-reported payments;*

* Section 9 of Act No. 25013 for *untimely payment of severance pay;*

* Sections 43-48 of Act No. 25345 about *salary continuation under Section 132 bis (LCT)* in the event that withholdings already made are unpaid, and unions are involved in actions or claims for social security contributions.

* Fines for *failure to deliver employment certificates* are also repealed. Certificated shall be now issued by the AFIP - ANSES.

* Section 15 of Act No. 26727 about *agricultural work and job banks for temporary workers* are also repealed.

* Section 50 of Act No. 26844 about fines for *unreported household workers* are also repealed.

* Act No. 25323 is repealed, together with any rule opposing or incompatible with the content of this title about fines for *non-registration* whether in whole or in part. (Chapter VI LB Repeal Section 99.- Repeal Sections 8 - 17 and 120, subsection a), of Act No. 24013; Section 9 of Act No. 25013; Sections 43 - 48 of Act No. 25345; Section 15 of Act No. 26727 and Section 50 of Act No. 26844. Section 100.- Act No. 25323 and any rules opposing or incompatible with the content of this title are hereby repealed).

We would like to highlight the following changes to the Employment Contract Act (LCT), namely:

- As to the *scope of application of labor and employment laws*, emphasis is placed on the nature of the employer-employee relationship, *specifically excluding works contracts, services contracts, agency agreements and all those regulated under the Civil and Commercial Code of Argentina (CCC, for its acronym in Spanish),* (see new wording of Section 2 LCT). The aim is to differentiate between

employment contracts and freelance agreements under the Civil and Commercial Code. "Section 88 LB.- Replace Section 2 of Act No. 20744 (consolidated text in 1976) as amended, by the following text: Section 2: Scope The effectiveness of this Act shall be subject to the enforcement of its provisions, compatible with the nature and hiring method in the industry in question and the specific applicable legal regime. The provisions of this Act shall not be applicable to: a) civil servants at the national, provincial, or municipal levels and in the Autonomous City of Buenos Aires, unless they are expressly covered by law or the applicable collective bargaining agreement; b) household employees, unless otherwise expressly stated and provided they are not incompatible and do not go against the nature and specificities of the Household Employee Regime; c) Agricultural workers, although the provisions of this law shall be applied by default provided they are not incompatible and do not go against the nature and specificities of the Agricultural Work Regime; d) Works contracts, services contracts, agency agreements and all those regulated under the Civil and Commercial Code."

- *The iuris tantum presumption under Section 23 LCT (rebuttable presumption) is mitigated in a text compatible with Section 2 LCT, including special contracts under the Civil and Commercial Code between independent contractors who take the risk of hiring their own staff, where any natural person (in the original text) working for them used to be automatically classified as an employee under an employment relationship, unless the circumstances, the nature of the relationship or its causes demonstrate otherwise. This presumption shall not apply, either, in the case of works contracts or professional services contracts, where the respective invoices or receipts are issued and payment is made by wire transfer as determined by the relevant regulation.* For all intents and purposes, this presumption does not apply to claims for Social Security benefits. "Section 89 LB.- Replace Section 23 of Act No. 20744 (consolidated text in 1976) as amended, by the following text: Section 23: Presumption - Existing Employment Contract. The fact that a person provides services for another party means that an employment contract is presumed to exist, unless the circumstances, the nature of the relationship or its causes demonstrate otherwise. This presumption shall not apply, either, in the case of works contracts or professional services contracts, where the respective invoices or receipts are issued and payment is made by wire transfer as determined by the relevant regulation. For all intents and purposes, this presumption does not apply to claims for Social Security benefits."

- Section 29 (LCT) is amended so now *any employee shall be deemed to be duly registered even when they are hired to provide services in a user company other than the one that hires them.* In addition, the user company shall be jointly and severally liable for all employment and social security obligations to the employees

assigned, exclusively in relation to obligations during effective service provision. These changes neutralize any court precedent whereby Section 29 (LCT) was considered inadequate and any employee in a user company should be registered, which led to double registration. "Section 90 LB.- Replace Section 29 of Act No. 20744 (consolidated text in 1976), as amended, by the following text: Section 29: Mediation. Intermediation. Joint and Several Liability. Principle of Subsidiarity. Employees shall be considered direct employees of those who register their employment, although they may have been hired for third-party companies. The user company shall be jointly and severally liable for all employment and social security obligations to the employees assigned, exclusively in relation to obligations during effective service provision.

- As to contractors and intermediaries, Section 136 (LCT), employees hired by contractors or intermediaries shall be entitled to ask the main company for which such contractors or intermediaries provide services or execute works, to *withhold any amounts due as wages, severance pay, or other monetary entitlements arising out of their employment from any payments that they should receive from their employer*. The main company shall be entitled to withhold without giving notice any owing amounts as social security contributions arising out of employees' employment from the payments to be received by their contractors or intermediaries. These payments shall be made to the order of the respective social security agencies as per the relevant regulation. The Tax Authority -AFIP- will regulate how all this works. "Section 92 LB.- Replace Section 136 of Act No. 20744 (consolidated text in 1976) as amended, by the following text:

"Section 136: Contractors and intermediaries. Employees hired by contractors or intermediaries may ask their main employer for whom such contractors or intermediaries provide services or perform works, to withhold any owing amounts as salary, severance pay, or other monetary entitlements as a result of their employment from the payment they should receive.

"Pursuant to Section 30 of Act No. 20744 (consolidated text in 1976) as amended, the main company shall be entitled to withhold without giving notice any owing amounts as social security contributions arising out of employees' employment from the payments to be received by their contractors or intermediaries. These payments shall be made to the order of the respective social security agencies as per the relevant regulation. Within ninety [90] days following the enactment of the Act of Bases and Starting Points for the Liberty of Argentines, the Tax Authority will have to set up a simplified mechanism for social security withholdings according to this Section."

- *The probationary period is extended from three to six months in general, Section 92 bis (LCT).* Either party may terminate employment without severance pay. The discussion now revolves around whether this language means the parties should give notice of termination or payment in lieu. In our opinion, the 15-day notice still stands since its essence lies in taking it, and payment in lieu is a non-exclusive option. At the same time, it is worth mentioning that the minimum 3-month period under Section 245 LCT has not been changed, and therefore, the lawmaker should correct the text to adapt it to the system smoothly. Collective bargaining agreements may extend this probationary period up to eight [8] months in companies with six [6] and up to one hundred (100) workers, and up to one [1] year in companies with up to five [5] workers. The existing enforcement rules remain unchanged. These changes have taken effect since the LB was signed into law. In other words, the six [6] month probationary period is in full force. The length of the probationary period of up to eight [8] months and up to [1] year varies depending on the applicable collective bargaining agreement. "Section 91 LB.- Replace Section 92 of Act No. 20744 (consolidated text in 1976) as amended, by the following text: Section 92 bis: Probationary period. Any employment contract for an indefinite period of time shall be deemed to include a 6-month probationary period. Collective Bargaining Agreements may extend such probationary period: a) up to eight [8] months in companies with six [6] and up to one hundred [100] workers; and b) up to one [1] year in companies with up to five [5] workers. Either party may terminate employment without cause during the probationary period without entitlement to severance pay. The probationary period shall be governed by the following rules: (i) Employers shall not hire the same employee more than once, using the probationary period. If so, by operation of the law employers waive the probationary period. (ii) The probationary period cannot be abused to avoid hiring employees, which is subject to penalties under in the respective regimes for breach of labor and employment laws. In particular, abuse of the probationary period means employers repeatedly hire different workers to do the same regular job. (iii) The parties have the rights and obligations of any employment relationship, with the exceptions established in this Section. Employees' rights also include union rights. (iv) The parties are obliged to pay social security contributions to access the benefits established in each case. (v) Employees are entitled to benefits for work-related injuries and diseases during the probationary period. Employees are protected against non-occupational injury or disease until the end of the probationary period if their employer decides to terminate the employment contract during that period. The provisions of the fourth paragraph of Section 212 shall not be applicable. (vi) The probationary period will be counted as time worked for all employment and social security purposes. Employers must register employees from their start date; otherwise, it is considered that they have waived the probationary period."

- As for *maternity leave*, employees' job stability is ratified. Employees may choose to reduce their leave before childbirth but no less than ten [10] days, and the remaining leave days will be added to the period after childbirth. In the case of preterm birth, the entire leave that was not taken before childbirth will be added to the period after childbirth, totaling a period of ninety [90] days. If employees are absent from work for a long time as a result of an illness that according to a medical prescription is related to their pregnancy or childbirth and prevents them from resuming work after maternity leave, female employees or pregnant persons shall be entitled to the benefits provided for in Section 208 of this law. This reform has been in full force and effect since the LB was signed into law. "Section 93 LB.- Replace Section 177 of Act No. 20744 (consolidated text in 1976) as amended, by the following text: Section 177. - Work Ban. Job Stability. In the 45 days prior to childbirth and the 45 days after childbirth, female employees or pregnant persons are not allowed to work.

"However, employees may choose to reduce their maternity leave before childbirth, but no less than ten [10] days; the remaining leave days will be added to the leave after childbirth. For preterm births, the entire period of unused prenatal leave shall be added to postnatal leave, resulting in a total of 90 days of leave.

"Female employees or pregnant persons must notify their pregnancy to their employer by submitting a physician's certificate containing the estimated due date, or require verification by their employer. Employees shall keep their employment during the periods indicated above and access the relevant social security benefits. They shall receive an amount equal to the salary for the maternity leave period in accordance with the conditions and requirements set forth in the respective regulation. Every woman or pregnant person during pregnancy is guaranteed the right to job stability, which is a vested right from the moment she notifies her pregnancy as mentioned in the previous paragraph. If they are absent from work for a long time, as a result of an illness that according to medical prescription is related to their pregnancy or childbirth and prevents them from resuming tasks after expiration of their maternity leave, they shall receive benefits under Section 208 of this law."

- *Termination for fair cause and termination for taking part in unlawful industrial actions.* Section 242 (LCT) about termination for fair cause without entitlement to severance pay is amended. The original general rule still stands, where either party may terminate employment in case of breach by the opposing party causing damages to such an extent that employment cannot continue. The courts shall conduct a reasonable assessment of the circumstances, taking into consideration the nature of the relationship resulting from the employment contract, as provided in this Act, and the particularities of each case. Fair cause for termination also

includes *employees' active participation in blockades or establishment occupations*. It is presumed that there is serious breach when, during an industrial action *the right to work of those who do not join the strike is affected through actions, events, intimidation or threat; entrances or exits are totally or partially blocked to stop people or goods from coming in or out*. Direct termination occurs when people or property of the company or third parties (facilities, merchandise, equipment and raw materials, tools, etc.) are damaged or inappropriately taken from the premises. Prior to termination, the employer shall request the employee in question to cease his/her misconduct, except in the case of damage to people or property in subsection c), where damage renders the request unnecessary. This standard has been in full force and effect since the effective date of the LB. "Section 94 LB.- Replace Section 242 of Act No. 20744 (consolidated text in 1976) as amended, by the following text: Section 242: Fair Cause. Employment contracts may be terminated by either party if the other party breaches it to the extent that it is impossible to continue employment. The Courts shall make a reasonable assessment of the case, taking into consideration the nature of the relationship arising out of the employment contract, as provided for in this law, and the modalities and personal circumstances in each case. The active participation of employees in blockades or occupations of establishments may constitute an objective reason to terminate an employment contract. It is presumed that there is serious breach when during an industrial action: a) the right to work of those who do not join the strike is affected by actions, events, intimidation or threat; b) entrances or exits are totally or partially blocked to stop people or goods from coming in or out; c) people or property of the company or third parties (facilities, merchandise, supplies and raw materials, tools, etc.) are damaged or inappropriately taken from the premises. Prior to termination, employers shall request the employees in question to cease their misconduct, except in the case of damage to people or property in subsection c), where damage renders the request unnecessary."

- *Discriminatory termination* is defined in Section 245 bis (LCT) where termination is discriminatory if it is based on race or ethnicity, religion, nationality, ideology, political or union opinion, sex or gender, sexual orientation, economic position, physical features or disability. In this case, the person claiming termination has the burden of proof. If the Courts find that termination is discriminatory, employers shall pay special increased compensation equal to five percent (50%) of that compensation established in Section 245 of Act No. 20744 (consolidated text in 1976) as amended, or compensation for seniority according to the special regime applicable in each case. Depending on the seriousness of the events, the Courts may increase this compensation up to one hundred percent (100%), according to the abovementioned parameters. This payment is not cumulative with any other

special compensation. In any case, termination means the definitive end of the employment relationship for all intents and purposes, thus eliminating the possibility of claiming precedents where the discriminatory termination is null and void, and the employee may be reinstated. Since the LB was signed into law, this standard has been in full force and effect. In other words, the application of the general Act No. 23592 against Discrimination of 1988, which used to be called the De La Rúa Law back in the days, does not specifically refer to employment matters but states that a discriminatory termination could be null and void, in which case the employee dismissed for discrimination could be reinstated. This reform not only sets aside this law by creating a new regime, but also imposes the onus probandi on the damaged worker, and does not accept the shift of the burden of proof. "Section 95 LB.- Include the following text as Section 245 bis of Law 20.744 (consolidated text in 1976) as amended: Section 245 bis: Increased compensation for discriminatory termination. Discriminatory Termination means employees are dismissed on grounds of race or ethnicity, religion, nationality, ideology, political or trade union opinion, sex or gender, sexual orientation, economic position, physical features or disability. In this case, the burden of proof falls on the party claiming the reason for termination, and in the event of a court ruling ratifying the discriminatory termination, employers shall pay special increased compensation equal to fifty percent (50%) of the compensation set forth in Section 245 of Act No. 20744 (consolidated text in 1976) as amended or compensation for seniority according to the special regime applicable in each case. Depending on the seriousness of the events, the Courts may increase this compensation up to one hundred percent (100%), according to the above-mentioned parameters. This payment shall not be cumulative with any other special increased compensation. In all cases, termination means the definitive end of the employment relationship for all intents and purposes."

- A *termination fund* may be created by a collective bargaining agreement where the parties seek to replace severance pay under Section 245 of Act No. 20744 with a fund or system of employment termination in accordance with guidance to be provided by the Executive. It is an aspirational standard because it requires the creation of a system included in the respective collective bargaining agreement with the signature of the signatory parties and subject to approval (homologation). Employers may choose to contract a private system at their own expense, in order to finance severance pay under this Section and/or the amount to be freely agreed between the parties in case of termination by mutual agreement in accordance with Section 241 of Act No. 20744. In all cases, companies may self-insure under the chosen system. This is an aspirational standard because in addition to the requirement that it should be implemented by a collective bargaining agreement, according to the LB, the Executive must regulate it. "Chapter III, Termination Fund,

Section 96 LB.- By a collective bargaining agreement, the parties may replace severance pay under Section 245 of Act No. 20744 with a fund or system of employment termination in accordance with guidance to be provided by the Executive. Employers may choose to contract a private system at their own expense, in order to finance severance pay under this Section and/or the amount to be freely agreed between the parties in case of termination by mutual agreement in accordance with Section 241 of Act No. 20744. In all cases, companies may self-insure under the chosen system.

- *Freelancers may have three independent collaborators* to carry out a productive undertaking and benefit from a special unified regime that will be regulated by the Executive. This is an aspirational standard. There is no subordination between them or with those who contract their services or works. Both the independent contractor and his/her collaborators shall make an individual monthly contribution to the Social Security System, the National Unions-run Health Insurance System, the National Health Insurance System and the Workers' Compensation System, under the conditions and requirements to be set by regulation. It is forbidden to fragment or divide establishments to obtain benefits in violation of the law where any of the typical features of an employment relationship, namely technical, legal or economic subordination, are eventually found. This depends on the type of activity, trade or profession in question. "Chapter IV Independent contractors with collaborators. Section 97 LB.- Independent contractors may have up to three [3] freelance workers to conduct a productive enterprise and will benefit from a special unified regime to be regulated by the Executive for this purpose. This system shall be based on the autonomous relationship between the parties, without subordination among them or with third parties who contract their services. Both the freelancer and their collaborators shall pay individual monthly fees to the Social Security System, the National Union-run Health Insurance System, the National Health Insurance System and the National Workers' Compensation System, under the conditions and requirements established by regulation. It is forbidden to fragment or divide establishments to obtain benefits in violation of the law. This Section shall specifically apply to freelance relationships between the parties. In other words, these relationships should not have any of the typical features of employment, i.e. technical, legal or economic subordination. This depends on the type of activity, trade or profession in question."

- For *permanent agricultural work*, *Job Banks remain in place as an option*. Employment termination shall be governed by Title XII LCT. As for job banks run by unions with legal status, employers may be presented with a list of necessary staff for the performance of temporary tasks in the activities described in this Act, in accordance with the resolutions issued for this purpose by the Agrarian Work

Commission. Employers may hire the suggested persons and/or any other persons available. In addition, any rule or regulation that opposes this Act and/or employers' freedom of hiring and employee selection is also repealed. "Chapter V, Agricultural Work. Section 98 LB.- Replace Sections 16 and 69 of Act No. 26727 by the following text: Section 16: Permanent continuous employment contract in agriculture. Unless expressly provided for by this Act, employment contracts in agriculture are permanent and continuous. Termination shall be governed by the provisions of Title XII of Act No. 20744 (consolidated text in 1976), as amended.

"For permanent workers in the agricultural sector, the provisions regarding the probationary period in Section 92 bis of Act No. 20744. Section 69 LB: Job bank. Job banks managed by unions with legal status may offer employers a list of the personnel necessary to carry out temporary tasks in the activities herein, in accordance with the resolutions of the Agricultural Work Commission. It is up to employers to hire the suggested candidates and/or any other candidates available. By this provision, any rule contrary to this Section or to employers' freedom of hiring and choosing personnel is repealed."

This reform is a good starting point for a process that should continue. It seeks to introduce new innovative changes to promote quality and reported employment, and the advancement of exponential technologies, robotics, automation and Artificial Intelligence.