

CALCULATING SUMMARY INDICATORS OF EMPLOYMENT PROTECTION LEGISLATION (EPL) IN LATIN AMERICA AND THE CARIBBEAN

The Employment Protection Legislation (EPL) methodology developed by the Organization for Economic Cooperation and Development (OECD) measures the degree of stringency of employment protection legislation of OECD and G20¹ countries, to determine, amongst others, its labour market impacts. The Inter-American Development Bank (IDB), in collaboration with the OECD, has applied this methodology to Latin American and Caribbean (LAC) countries.

This document is divided in two sections. Section 1 describes the EPL methodology according to OECD (2013a). Section 2 provides additional information to facilitate the interpretation of the methodology in the context of LAC countries.

1. Methodology

For each country, Employment Protection Legislation (EPL) is described along 21 basic items which can be classified in three main areas: (i) protection of regular workers against individual dismissal; (ii) regulation of temporary forms of employment; and (iii) additional, specific requirements for collective dismissals. More precisely, items 1-9 in the table below refer to the rules affecting regular (permanent) workers dismissed on personal grounds or economic redundancy, but without fault; items 10-17 to the rules affecting standard fixed-term contracts and temporary-work-agency (TWA) employment; and items 18-21 to additional rules applying to collective dismissals. When regulations differ between large and small firms, only large firms are taken into account. For reference, for the purpose of the computation of the indicators, a standard fixed-term contract is defined as a generic employment contract with a precisely-specified end date (in the form of day, month and year at which the employment relationship is set to end, if the contract is not renewed). By contrast, a TWA contract is defined, for the purpose of the computation of the indicators, as an employment contract under which the employer (hereafter the agency), within the framework of its business or professional practice, places the employee at the disposal of a third party (hereafter the user-firm) in order to perform work (hereafter the assignment) under supervision and direction of that user-firm by virtue of an agreement for the provision of services between the user-firm and the agency. Where relevant, OECD indicators are based on TWA assignments only. **Table 1 describes the method used to convert raw data on each item into a cardinal unit or value (0-2, 0-3, 0-4, number of days, number of months) which is then converted into a score measured on a 0-6 scale, with higher values representing stricter regulation.** As regards a number of items, Table 1 reports typical cases corresponding to integer cardinal units. However, as other situations not reported in the table are possible, fractional values are used to account for these cases. In certain cases fractional values are the result of averages of different rules applying to subsets of workers. See OECD (2013b), especially Box 2.1, for more details on the coding of specific situations.

¹ Recently, additional emerging countries were included.

Table 1. Quantifying the 21 basis measures of employment protection strictness

A. Individual dismissals of workers with regular contracts

	Original unit and short description of typical cases		Assignment of numerical strictness scores						
			Assigned scores						
			0	1	2	3	4	5	6
1: Notification Procedures	Scale 0-3		Scale (0-3) × 2						
	0	when an oral statement is enough;							
	1	when a written statement of the reasons for dismissal must be supplied to the employee;							
	2	when a third party (such as works council or the competent labour authority) must be notified;							
	3	when the employer cannot proceed to dismissal without authorisation from a third party.							
2: Delay involved before notice can start	Days Estimated time includes, where relevant, the following assumptions: 6 days are counted in case of required warning procedure, 1 day when dismissal can be notified orally or the notice can be directly handed to the employee, 2 days when a letter needs to be sent by mail and 3 days when this must be a registered letter.		≤ 2	< 10	< 18	< 26	< 35	< 45	≥ 45
3: Length of the notice period at	9 months tenure	Months	0	≤ 0.4	≤ 0.8	≤ 1.2	< 1.6	< 2	≥ 2
	4 years tenure	Months	0	≤ 0.75	≤ 1.25	< 2	< 2.5	< 3.5	≥ 3.5
	20 years tenure	Months	< 1	≤ 2.75	< 5	< 7	< 9	< 11	≥ 11
4: Severance pay at	9 months tenure	Months pay	0	≤ 0.5	≤ 1	≤ 1.75	≤ 2.5	< 3	≥ 3
	4 years tenure	Months pay	0	≤ 0.5	≤ 1	≤ 2	≤ 3	< 4	≥ 4
	20 years tenure	Months pay	0	≤ 3	≤ 6	≤ 10	≤ 12	≤ 18	> 18
5: Definition of justified or unfair dismissal	Scale 0-3		Scale (0-3) × 2						
	0	when worker capability or redundancy of the job are adequate and sufficient ground for dismissal;							
	1	when social considerations, age or job tenure must when possible influence the choice of which worker(s) to dismiss;							
	2	when a transfer and/or a retraining to adapt the worker to different work must be attempted prior to dismissal;							
	3	when worker capability cannot be a ground for dismissal.							
6: Length of trial period	Months Period within which, regular contracts are not fully covered by employment protection provisions and unfair dismissal claims can usually not be made.		≥ 24	> 12	> 9	> 5	> 2.5	≥ 1.5	< 1.5
7: Compensation following unfair dismissal	Months pay Typical compensation at 20 years of tenure, including back pay and other compensation (e.g. for future lost earnings in lieu of reinstatement or psychological injury), but excluding ordinary severance pay.		≤ 3	≤ 8	≤ 12	≤ 18	≤ 24	≤ 30	> 30

	Original unit and short description of typical cases	Assignment of numerical strictness scores							
		Assigned scores							
		0	1	2	3	4	5	6	
8: Possibility of reinstatement following unfair dismissal	Scale 0-3		Scale (0-3) x 2						
	0	no right or practice of reinstatement;							
	1	reinstatement rarely or sometimes made available;							
	2	reinstatement fairly often made available;							
9: Maximum time to make a claim of unfair dismissal	Months	Before dismissal takes effect	≤ 1	≤ 3	≤ 6	≤ 9	≤ 12	> 12	
	Maximum time period after dismissal notification up to which an unfair dismissal claim can be made.								

B. Temporary employment

	Original unit and short description	Assignment of numerical strictness scores							
		Assigned scores							
		0	1	2	3	4	5	6	
10: Valid cases for use of fixed-term contracts (FTC)	Scale 0-3		6-(Scale (0-3) x 2)						
	0	fixed-term contracts are permitted only for "objective" or "material situation", i.e. to perform a task which itself is of fixed duration;							
	1	if specific exemptions apply to situations of employer need (e.g. launching a new activity) or employee need (e.g. workers in search of their first job);							
	2	when exemption exist on both the employer and employee sides;							
11: Maximum number of successive FTC	Number	No limit	≥ 5	≥ 4	≥ 3	≥ 2	≥ 1.5	< 1.5	
12: Maximum cumulated duration of successive FTC	Months	No limit	≥ 36	≥ 30	≥ 24	≥ 18	≥ 12	< 12	
13: Types of work for which temporary work agency (TWA) employment is legal	Scale 0-4		6-(Scale (0-4) x 6/4)						
	0	when TWA employment is illegal;							
	1	only allowed in specified industries;							
	2	only allowed for "objective reasons";							
	3	generally allowed, with specified exceptions;							
14: Restrictions on number of renewals.	Yes/No	-	-	No	-	Yes	-	-	
15: Maximum cumulated duration of TWA assignments	Months	No limit	≥ 36	≥ 24	≥ 18	≥ 12	> 6	≤ 6	

	Original unit and short description	Assignment of numerical strictness scores							
		Assigned scores							
		0	1	2	3	4	5	6	
16: Does the set-up of a TWA require authorisation or reporting obligations?	Scale 0-3		Scale (0-3) x 2						
	0	no authorisation or reporting requirements;							
	1	requires special administrative authorisation;							
	2	requires periodic reporting obligations;							
17: Do regulations ensure equal treatment of regular and agency workers at the user firm?	Scale 0-2		Scale (0-2) x 3						
	0	no requirement for equal treatment;							
	1	equal treatment regarding pay <u>or</u> working conditions;							
	2	equal treatment regarding pay <u>and</u> working conditions.							

C. Additional regulations for collective dismissals

	Original unit and short description	Assignment of numerical strictness scores							
		Assigned scores							
		0	1	2	3	4	5	6	
18: Definition of collective dismissal	Scale 0-4		Scale (0-4) x 6/4						
	0	if there is no additional regulations for collective dismissals;							
	1	if specific regulations apply from 50 dismissals upward;							
	2	if specific regulations apply from 20 dismissals onward;							
	3	if specific regulations apply at 10 dismissals;							
	4	if specific regulations start to apply at below 10 dismissals;							
19: Additional notification requirements	Scale 0-2		Scale (0-2) x 3						
	There can be notification requirements to <i>works councils</i> (or employee representatives), and to <i>government authorities</i> such as public employment offices. Countries are valued according to whether there are additional notification requirements on top of those requirements applying to individual redundancy dismissal.								
	0	no additional requirements;							
	1	when one more actor needs to be notified;							
20: Additional delays involved before notice can start	Days Delays in addition to those in the case of individual dismissal		0	< 25	< 30	< 50	< 70	< 90	≥ 90
	Scale 0-2		Scale (0-2) x 3						
This refers to whether there are additional <i>severance pay</i> requirements and whether <i>social compensation plans</i> (detailing measures of reemployment, retraining, outplacement, etc.) are obligatory or common practice									
21: Other special costs to employers	0	no additional requirements;	Scale (0-2) x 3						
	1	additional severance pay <u>or</u> social compensation plans required;							

	Original unit and short description	Assignment of numerical strictness scores						
		Assigned scores						
		0	1	2	3	4	5	6
2	additional severance pay <u>and</u> social compensation plans required.							

After converting each item to a cardinal scale, the synthetic indicators are calculated using the weights shown in Tables 2 and 3. There are two sub-indicators measuring the strictness of regulation on regular contracts. They concerns regulations on individual dismissals and additional provisions for collective dismissals. Then, the synthetic indicator for individual and collective dismissals for workers with a regular contract (EPRC) encompasses these two indicators. A synthetic indicator for temporary contracts (EPT) is also available.

The OECD presents three versions of synthetic indicators, reflecting changes over time in the breadth of information incorporated into them. Nevertheless, the methodology applied for Latin American countries uses the latest version².

² Called “version 3” by the OECD, available since 2008.

Table 2 Strictness of employment protection – individual and collective dismissals (regular workers), summary indicator weights

Level 1 Scale 0-6	Level 2 Scale 0-6	Level 3 Scale 0-6	Level 4 Scale 0-6	Version 3 weights
Individual and collective dismissals – regular workers (EPRC)	Individual dismissals – regular workers (EPR) (version 2 & 3: 5/7); (version 1: 1)	Procedural inconveniences (1/3)	1. Notification procedures 2. Delay to start a notice	(1/2) (1/2)
		Notice and severance pay for no-fault individual dismissals (1/3)	3. Notice period after 9 months 4 years 20 years	(1/7) (1/7) (1/7)
			4. Severance pay after 9 months 4 years 20 years	(4/21) (4/21) (4/21)
				5. Definition of unfair dismissal
			Difficulty of dismissal (1/3)	6. Trial period
		7. Compensation		(1/5)
		8. Reinstatement		(1/5)
		9. Maximum time for claim		(1/5)
		18. Definition of collective dismissal		(1/4)
		Additional provisions for collective dismissals (EPC) (version 2 & 3: 2/7); (version 1: 0)	19. Additional notification requirements	(1/4)
20. Additional delays involved	(1/4)			
21. Other special costs to employers	(1/4)			

Table 3 Strictness of employment protection – temporary contracts, summary indicator weights

Level 1 & 2 Scale 0-6	Level 3 Scale 0-6	Level 4 Scale 0-6	Version 3 weights
Temporary contracts (EPT)	Fixed term contracts (EPFTC) (1/2)	10. Valid cases for use of fixed-term contracts	(1/2)
		11. Maximum number of successive contracts	(1/4)
		12. Maximum cumulated duration	(1/4)
	Temporary work agency employment (EPTWA) (1/2)	13. Types of work for which is legal	(1/3)
		14. Restrictions on number of renewals	(1/6)
		15. Maximum cumulated duration	(1/6)
		16. Authorisation and reporting	(1/6)
	17. Equal treatment	(1/6)	

2. Additional Guidelines for Latin American and the Caribbean Countries

The EPL methodology was designed to analyze employment regulations of countries whose labour legislation differs, in certain cases, with that of LAC countries. Therefore, this section provides additional clarifications that might be useful when trying to understand the values assigned to each country.

To facilitate the presentation, we distinguish between general clarifications that apply to all LAC countries from particular clarifications that apply only to Latin American (LA) countries. The reason for this distinction is that the EPL methodology can be more easily interpreted in Caribbean countries with Anglo-Saxon legislation.

General aspects applicable to LAC countries

- 1) Sources of information used to apply the EPL methodology were those in force as of December, 31st, 2013 (legislation, case law, collective agreements –in certain cases-). Therefore, legislative changes, if any, enacted after the above mentioned date, will not be reflected in this work. These changes will be considered in future releases of the EPL database.
- 2) Equivalentents: one week equals 0.23 month.

Specific aspects particularly relevant to LA countries

Definitions

Dismissal:

The EPL methodology distinguishes between: dismissal for personal reasons, but without fault and dismissal for economic redundancy. Dismissal for personal reasons without fault: in this case, EPL indicators cover all dismissals that, while dependent on the employee's lack of capacity, cannot be clearly attributed to his/her bad will or deliberate action. So, in general, under this category fall: 1) poor performance, 2) professional or physical inaptitude. Dismissal for economic redundancy: EPL indicators include reductions of the workforce due to economic reasons.

This distinction considered by the EPL methodology is not common in labour codes of LA countries³. On the contrary, LA's legislation distinguishes between dismissal for just cause and dismissal without just cause (or unjustified). Dismissal for just cause: includes dismissals related to employees' misconduct⁴ and/or lack of capacity⁵. Also, in certain countries, just cause is

³ By contrast, it is common in the Caribbean countries (Jamaica, The Bahamas and Barbados).

⁴ Just causes related to misconduct: immoral acts, defamation against the employer, improper acts committed to fellow co-workers, damages to employer's property, disclosure of trade secrets or confidential information, unjustified

related to economic reasons.⁶ In this case, the employer is not liable when dismissing for just cause and, in general, no severance payment must be paid⁷. Dismissal without just cause: includes situations where there is no just cause for dismissal or when the just cause alleged by the employer cannot be proved at Court. In this case, the employer is obliged to pay a severance indemnity or reinstate the worker to his position –in those legislations in which reinstatement is a remedy-. Other additional benefits must be paid.

As a consequence of these differences in regulations, averages must be taken when assigning values to each item. For that reason, the guidelines below have generally been followed.⁸ Notice, however, that this list of coding rules should be considered only as suggestive since, in a number of cases, items cannot be scored in isolation.⁹

Items 1 & 2: Notification procedures. Delays involved before notice can start

- 1) No average is taken: if just cause for dismissal refers exclusively to employee's misconduct (not to lack of capacity). In this case, only regulations applicable to unjustified dismissal¹⁰ are considered for the quantification.
- 2) Averages are taken: when notification procedures vary between dismissal for personal reasons (if they include lack of capacity) and dismissal for economic reasons¹¹.

Item 3: Length of notice period

- 1) General rule: legislation concerning length of notice period, generally referring to unjustified dismissal, must be considered.
- 2) Averages are taken: if just cause includes lack of capacity and notice periods are required also for just cause.
- 3) Averages are taken: if length of notice period varies among different categories of employees (for example blue collar and white collar)¹².
- 4) Averages are taken: in those countries, in which, as a general rule there is no notice period, except for certain specific situation of dismissal for just cause (for example poor performance,

absences, breach of safety and security regulations, presentation of false certificates when the contract was concluded, criminal acts, breach of the obligations under the employment agreement, amongst others.

⁵ Just causes related to lack of capacity: low or poor performance, professional inaptitude, chronic disease.

⁶ Panama and Argentina.

⁷ In Spanish "severance payment" is also referred to as: Auxilio de cesantía, Indemnización por tiempo de servicios o por tiempo servido, etc). However, those indemnities that are paid to the employee also in cases of voluntary quit are not taken into account for the computation of the indicators (e.g. auxilio de cesantía in Colombia – art. 259 Labour Code).

⁸ These guidelines contain the clarifications and corrections made by OECD for LA countries.

⁹ For example, if the labour code contemplates both dismissal without cause and for redundancy, and the former is less expensive than the latter for the employer in the case of individual dismissals, only the former is usually considered.

¹⁰ Nicaragua's case: where there is a specific procedure for just cause dismissal (article 45 Labour Code) where prior authorization from the Labour Inspector is required. However, there is no specific procedure for unjustified dismissal. For that reason, the assigned value for both items was 0.

¹¹ Panama.

¹² Bolivia.

breach of employment contract's obligations, amongst others). In this case, the general rule and specific situations must be averaged¹³.

Item 4: Severance pay at different tenure durations

- 1) No average is taken: if just cause for dismissal refers exclusively to employee's misconduct (but not to lack of capacity). In this case only severance pay for unjustified dismissal must be considered. Thus the assigned value (in the corresponding EPL indicator) and the legal severance indemnity will be equal¹⁴. Similarly, no average is taken, in those countries where, although lack of capacity is a just cause for dismissal, regulations are very strict, requiring that poor performance or professional inaptitude, should be manifest¹⁵.
- 2) Averages are taken: if just cause for dismissal includes also cases of lack of capacity. In this case, averages between severance pay for unjustified dismissal (which in general varies at different tenure durations) and dismissal for just cause (where no severance pay is due)¹⁶ are taken. This averaging method determines that the value assigned for the purpose of calculating quantitative EPL indicators differs from the amount corresponding to severance pay for unjustified dismissal granted under applicable legislation, (in general, this value corresponds to half of the amount of severance pay for unjustified dismissal)¹⁷.
- 3) Special averages are taken: in those countries where lack of capacity refers only to certain categories of workers (those with managerial, supervision, surveillance positions or others with similar responsibility and importance)¹⁸.
- 4) Reinstatement: in those countries where legislation grants reinstatement for dismissed workers (in certain cases with additional compensation for unjustified dismissal), the value assigned to this item is usually "0" as severance pay for unjustified dismissal is considered under item 7 "Compensation following unfair dismissal"¹⁹.
- 5) Job stability: in those countries where job stability is granted to workers as from certain tenure duration, and as a consequence these employees can only be dismissed for just cause, special calculations are made. In these countries if just cause for dismissal is not proved, the employee has the right to request reinstatement to his job²⁰.

Item 5 Definition of fair and unfair dismissal

- 1) General rule: in those countries where the employer has the right to dismiss without justifying a cause (unjustified dismissal) by paying a severance indemnity, the value assigned is "0", which corresponds, according to the EPL methodology, to those situations in which the employers can dismiss for personal reasons (misconduct or lack of capacity) and for economic reasons (redundancy, cease of the business)²¹.

¹³ Colombia.

¹⁴ Guatemala, Costa Rica, Nicaragua, Uruguay and Dominican Republic.

¹⁵ Ecuador: Labour Code, article 172 numeral 5 requires "worker's manifest inaptitude".

¹⁶ Colombia

¹⁷ The legal severance indemnity for unjustified dismissal is described under the column "regulations in force".

¹⁸ El Salvador: Labour Code, article 50 numeral 3.

¹⁹ Bolivia, Honduras, Panama, Peru.

²⁰ Paraguay: employees that have worked for the same employer for 10 years or more, acquire job stability.

²¹ Nicaragua, Costa Rica, El Salvador, Guatemala, Dominican Republic, amongst others.

- 2) Averages are taken: in those countries where the employer has the right to dismiss without cause (value “0”), however there are certain restrictions for dismissals for economic reasons (value greater than 0)²².
- 3) Special averages are taken: in those countries where conditions differ between personal and economic reasons. In certain countries lack of capacity or inefficiency as a just cause for dismissal requires to be qualified as “manifest” (therefore, as there are important restrictions, the EPL methodology assigns a value of “2”) but, on the other hand, redundancy is not a just cause for dismissal (the EPL methodology assigns a value “3”). Average: “2.5”.

Item 7: Compensation following unfair dismissal

- 1) General rule: compensation following unfair dismissal applies to those situations where the employee has to claim compensation before court. In this case, the competent Tribunal or Judge will (if unfair dismissal is proved) condemn the employer to pay compensation and other benefits granted under applicable legislation.
- 2) In principle, the calculation of EPL indicators is as follows: typical compensation for a 20-year tenure employee plus back pay²³(assuming that a court case takes 6 months) minus ordinary severance payment (item 4)²⁴.
- 3) See Item 4 numeral 4, in such case compensation for unfair dismissal is considered in this item.

Item 8: Reinstatement option following unfair dismissal

- 1) General rule: if the employers can avoid enforcement of reinstatement orders by paying severance indemnity, the assigned value is “0”, regardless the fact that legislation grants reinstatement to dismissed employees.
- 2) The value assigned is also “0” if reinstatement only applies to certain categories of workers which have a special protection (pregnant women or recent mothers, dismissal due to trade union membership, dismissal on prohibited grounds -religion, race, sex, political opinion or similar situations-).

Items 13 a 17: Temporary Work Agencies

- 1) Item 13: if TWA is illegal, indicators of the remaining items (14-17) take maximum values²⁵.
- 2) Item 14: when there are no regulations regarding renewals or prolongations of TWA assignments with the user firm, but there are restrictions for FTC contracts, the value assigned is “3” (Yes/No), if, when assignments are fixed-term, the duration of assignments with the user-firm and contracts between the agency and the worker typically coincide.

²² Argentina.

²³ Back pay: salaries lost as from the date of filing the lawsuit until the final resolution.

²⁴ Nicaragua.

²⁵ Venezuela, where the assigned values are: Item 14: Yes, Item 15: <6 months, Item 16: 3, Item 17: 2.

- 3) The same rule applies to Item 15. When there are no regulations on the maximum cumulated duration of TWA assignments with the user firm, FTC rules apply if, when assignments are fixed-term, the duration of TWA assignments and TWA contracts typically coincide.

Items 18 a 21: Additional requirements for collective dismissals

- 1) Definition of collective dismissal: a) if there is no legal definition, case law applies (however, legal definition or case law are considered only if they imply additional restrictions with respect to individual dismissals – as codified in items 19-21). b) If there are neither legal nor case law definitions, situations that might imply the termination (of all or part) of the employment agreements must be considered (for example termination or reduction of activities, lack of raw material, etc.)
- 2) Specific requirements: if a specific procedure applies to certain economic dismissals (final termination or reduction of the activities; closure of one entire establishment, etc), however standard procedures for individual dismissals can be applied in the remaining cases, averages between the specific procedure and standard procedure are taken.²⁶
- 3) Item 21: when an authorization from a Government Authority is required for dismissals grounded in cease or reduction of the activities, suspension, etc, the assigned value is at least “0.5” (as the authorization might not be necessarily granted, thus implying a restriction).

References

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²⁶ Nicaragua: value 2.