



Abogados & Notarios

HIRING PERSONNEL IN COSTA RICA

HIRING PERSONNEL IN COSTA RICA: EMPLOYEES VS. INDEPENDENT CONTRACTORS – EMPLOYMENT IN COSTA RICA – EMPLOYMENT AND LABOR LAW COSTA RICA – COSTA RICA CORPORATE LABOR LAW – COSTA RICA LABOR CODE – By: Lic. Rogelio Navas Rodríguez, Costa Rica Labor Attorney – If you are considering to hire personnel in Costa Rica, as follows we provide information that might be valuable when deciding if you should hire an employee or an independent contractor. You will notice that hiring an employee implies more obligations and responsibilities (i.e. payment of employee rights, granting vacation, payment of Christmas bonus -also known as thirteenth month bonus (aguinaldo, in Spanish)-, severance, Social Security, workers' compensation policy, among others), while hiring an independent contractor may be simpler. Nevertheless, you will also learn that if you hire an independent contractor but, in reality, the contractor performs as an employee, and the client as an employer, contingencies may be considerable and you assume the risk of paying fines, late-payment interest and even getting your business closed. It is then important to make the right choice on the way you hire personnel.

WHAT IS AN EMPLOYER? Article 2 of the Labor Code of Costa Rica states that an employer is any individual or entity that employs the services of others, by virtue of an employment agreement.

WHAT IS AN EMPLOYEE? The term "employee" is defined as any individual who provides his or her services to another individual or entity by virtue of an employment agreement. It must be noticed that, while an employer can be an individual or an entity, only an individual can be an employee. This will be important when we explain the "Personal Service" element that must be present in any employment relationship.

WHAT IS AN EMPLOYMENT AGREEMENT? Article 18 of the Costa Rica Labor Code defines an employment agreement as the one by means of "*which the individual is obligated to provide his or her services to others or to perform work, under their permanent dependence and immediate or delegated direction, and in exchange of a compensation of any kind or form.*" It is further stated that "*The existence of such an agreement is presumed between the worker who provides his or her services and the person or entity who receives them.*"

WHAT IS AN EMPLOYMENT RELATIONSHIP? Based on the definitions quoted above, we can define an employment relationship as the one in which (i) an individual provides his or her services, (ii) in exchange of a compensation, and (iii) under subordination of an employer.

These principles have been continuously present in our case law, and continue to be confirmed. Ruling number 2009-001146 of the Second Chamber of the Supreme Court of Justice of Costa Rica, dated November 12th, 2009, states as follows:

“[...] the employment nature of a specific legal relationship, as repeatedly indicated by this Chamber, may be determined by the existence of certain characteristic elements. To that end, and based on the concepts of employer and employee set forth in articles 2 and 4 of the Labor Code, article 18 must be studied, as it defines the employment agreement. [...]”

“[...] The abovementioned article 18 also establishes the presumption of an employment relationship between the person providing the services and the one who receives them. Such legal presumption admits proof to the contrary as to the existence of such a relationship. Regarding the above, three are the elements that, from a legal standpoint, define the nature of an employment relationship: 1) The service is rendered personally by the worker; 2) A compensation as consideration for the services received from the worker; and 3) The presence of subordination of one with respect to the other. The first two elements, provision of service or execution of works and compensation, are also present in other type of relationships, thus configuring what the doctrine and case law have considered “gray areas” or “borderline cases”. This has led both to have subordination, in general, as the defining, characteristic and distinctive element of the existence of an employment relationship. [...]”

As follows, we explain each one of the above mentioned elements of an employment relationship:

ELEMENTS OF AN EMPLOYMENT RELATIONSHIP:

- **PERSONAL SERVICE:** For a contractual relationship to be considered an employment relationship, services must be rendered personally by the hired individual. That means that the employee cannot be replaced by another individual to perform the same services, as we would then be before a completely separate labor relationship. In an employment relationship, the employer hires the services of certain specific individual because there is an interest in said individual’s particular skills, knowledge or profile; therefore, it is the chosen person who must provide the services he or she was hired for.

Our Courts have stated that any contractual relationship in which replacement is possible, or in which the hired individual can appoint another to provide the agreed services, is not an employment relationship.

- **COMPENSATION.** For a contractual relationship to be considered an employment one, the individual providing his or her services must obtain compensation for his or her work. If the services are rendered without any compensation, there is no labor relationship.

- **SUBORDINATION.** Subordination is the main element that must be present in all employment relationships. There is subordination when the hired individual is under the authority of the employer and must follow the employer’s orders and instructions. The obligation of having to work at certain premises and under certain shifts; the existence of a

disciplinary regime (or when disciplinary action has been already taken for any reason); having to follow instructions on the means of how work must be done; the provision of tools, gear and materials by the employer; and the payment by the employer of benefits and duties that typically only derive from an employment relationship, are examples of circumstances indicating that there is subordination; hence, that an employment relationship exists.

It has been stated by the Costa Rican Supreme Court that even when the personal service and compensation elements are hard to prove, when there is subordination, there is no doubt that one is before an employment relationship.

There are also several principles of law that are useful to have more clarity on if whether or not we are before an employment relationship. Said principles are the following:

PRESUMPTION OF AN EMPLOYMENT RELATIONSHIP: As indicated a few paragraphs above, the existence of an employment relationship is presumed, unless there is proof evidencing the opposite. (Article 18 of the Costa Rican Labor Code). Consequently, if an independent contractor is hired, but there is no way to prove that the nature of the contractual relationship was not of an employment relationship, the existence of an employment relationship will be presumed, and the client of the independent contractor becomes his or her employer and, thus, retroactively responsible for all rights and duties that were not paid.

“INDUBIO PRO OPERARIO” PRINCIPLE: On top of the presumption on the existence of an employment relationship, there is a principle of law applicable to all labor relationships in Costa Rica known as *“indubio pro operario”*, which states that in case of doubt, any conflict or situation must be decided in favor of the employee. When it comes to evaluating what is more beneficial for an individual between the application of ordinary contractual laws and labor law, the later provide better guarantees, benefits and protections that the first ones; therefore, any situation in which the nature of a contractual relationship is doubtful, our authorities are obliged to decide in favor of the existence of an employment relationship. This principle is contemplated in article 16 of the Costa Rican Labor Code, which states that that in the event of a conflict between labor law provisions and provisions of another nature, labor law will always supersede other laws.

EMPLOYMENT AGREEMENT AND THE PRINCIPLE OF “REALITY CONTRACT” Another principle of law that is applicable to all labor relationships is the one known as *“reality contract”*. According with said principle, what happens in reality supersedes what was agreed in writing. This is important as if an independent contractor agreement is executed, but in reality the parties act and perform as they would in an employment relationship, it will be deemed that the relationship was of employment nature.



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WHAT TO DO TO AVOID RISKS AND CONTINGENCIES? In order to avoid assuming any risks and unwanted contingencies, such as the payment of penalties and late-payment interest to the Costa Rican Social Security Agency (Caja Costarricense del Seguro Social (CCSS), in Spanish), retroactive payment of all unpaid employment benefits, and even the closure of business, before hiring someone in Cost Rica one should do a careful assessment about which model suits best for the needs of the recipient or beneficiary of the services. If one is mainly interested in the final result, regardless of the means and individuals used, then you may want to hire an independent contractor; but if being in control of how, when, where and by who the services are provided, then an employment relationship could be the safe choice.

If you should need further information or assistance with this matter, please contact us at: navas@costarica-law.com.