

August 19, 2025

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## **How to Comply with Puerto Rico's Short-Term Disability Mandate**

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*Puerto Rico benefits & compensation attorney Carlos Gonzalez shares his practical experience with the alternatives available to companies doing business in Puerto Rico for complying with the local non-occupational short-term disability benefits mandate, commonly known as SINOT.*

Pursuant to [Puerto Rico Act No. 139-1968](#), as amended ("Act 139"), all for-profit companies doing business in Puerto Rico must provide a minimum level of non-occupational short-term disability benefits to their Puerto Rico employees. To that end, employers must, generally, participate in the short-term disability insurance program administered by the [Puerto Rico Department of Labor and Human Resources](#) (the "PR-DOL") commonly known as SINOT (i.e., the Spanish acronym for *Seguro de Incapacidad No Ocupacional Temporera* or Short-Term Non-Occupational Disability Insurance).

SINOT is essentially a payroll tax paid equally by employers and their Puerto Rico employees to the PR-DOL that allows employees who become permanently or temporarily disabled due to a non-work-related injury or illness to receive from the PR-DOL fairly small salary continuation payments for up to 26 weeks or a minimal lump sum payment in the event of dismemberment; and it allows the employees' dependents to receive a small lump sum upon the employee's death.

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Rather than participating in SINOT, an employer may comply with the local short-term disability benefits mandate (hereinafter referred to as the “Mandate”, although it is also commonly known simply as SINOT) by including its Puerto Rico employees in a short-term disability insurance policy or self-funded program (collectively an “STD plan”) established and administered in accordance with the Employee Retirement Security Act of 1974, as amended (“ERISA”). For that, the STD plan must provide disability benefits equal to or greater than those available under SINOT, which is always the case; the contributions or insurance premiums paid by employees under the STD plan must not be higher than the employee-share of payroll taxes payable under SINOT; and the employer or its authorized representative (e.g., the insurance company issuing the policy forming part of the STD plan) must obtain from the PR-DOL a written determination allowing the employer to use its STD plan, rather than SINOT, as the vehicle for complying with the Mandate.

Since the disability benefits available under SINOT are so inadequate, and because SINOT is essentially the insurer of last resource for companies that for one reason or another are unable or unwilling to establish an STD plan, its premiums are relatively high vis-à-vis its covered benefits. As a result, many, if not most, companies doing business in Puerto Rico prefer to comply with the Mandate through their own STD plans, rather than by participating in SINOT. This article provides an overview of the Mandate and SINOT; it then describes the process that employers should follow to comply with the Mandate through an STD plan.

## **Mandate’s Overview**

### **1. Employers Subject to Mandate**

All for-profit companies operating in Puerto Rico that employ one or more regular Puerto Rico employees are subject to the Mandate. Section (h) of Act 139, [11 L.P.R.A. §202\(h\)](#). This includes corporations, partnerships, and LLCs; private companies and publicly held corporations; and domestic and foreign corporations. However, the Mandate does not apply to non-profit corporations, such as charitable organizations, churches, and religiously affiliated hospitals, schools, and universities, that have received a tax-exempt status determination from Hacienda or the IRS. Section 2(j)(6)(Q) of Act 139, 11 L.P.R.A. §202(j)(6)(Q).

It should be noted that, as a result of the Title I coverage exception of ERISA §4(b)(3) on employee benefit plans or programs designed to comply with state disability insurance laws, the Mandate is not preempted by ERISA §514(a). See, e.g., [ERISA Advisory Opinion 97-21A](#). Thus, employers doing business in Puerto Rico should not waste time and resources looking for ERISA-based arguments or reasons to avoid the Mandate but should instead participate in SINOT or establish an STD plan.

## **2. Employees Covered by Mandate**

The Mandate covers or protects all Puerto Rico regular employees (i.e., employees other than seasonal employees and employees classified as chauffeurs) who received at least \$150 in taxable wages from the employer during the “basic year”, which means the first four calendar quarters within the immediately preceding five calendar quarters. Sections 2(m) and 3(b)(1) of Act 139, 11 L.P.R.A. §202(m) and §203(b)(1). Given the insignificant \$150 taxable wages eligibility threshold, for-profit companies doing business in Puerto Rico should assume that all their non-seasonal local employees, whether full-time or part-time, are covered by the Mandate. Employees classified as chauffeurs, such as taxi, ambulance, and truck drivers, are covered by the short-term disability mandate of [Puerto Rico Act No. 428-1950](#), commonly known as *Seguro Choferil*, which is outside the scope of this article.

## **3. Payroll Tax**

Unless the employer complies with the Mandate through an STD plan rather than SINOT, each calendar year the employer and each of its covered employees must pay a payroll tax to the PR-DOL (i.e., the required SINOT insurance premiums) equal to 0.3% of the first \$9,000 of the covered employee’s taxable wages for the current year. Sections 8(a)(2) and (b)(1) of Act 139, 11 L.P.R.A. §208(a)(2) and (b)(1). This payroll tax does not apply to annual taxable wages above \$9,000. If, as is oftentimes the case, all covered employees earn more than \$9,000/year, this means that the employer pays \$27 per each of its covered employees and each covered employee also pays \$27, for a combined SINOT insurance premium of \$54/year. Rather than withholding and depositing with the PR-DOL the employees’ share of SINOT insurance premiums, to improve employer-employee relations, some employers assume the payment of the full amount (i.e., 0.6% of the first \$9,000 of each employee’s taxable wages) and do not charge any premiums to their employees.

The PR-DOL’s SINOT quarterly payroll tax return, together with the corresponding payroll taxes, are filed and deposited electronically through the [PR-DOL’s Employer Services Portal](#).

## **4. Non-Occupational Disability**

An employee is considered “non-occupationally disabled,” thus eligible for disability benefits under SINOT, if: (a) due to an injury, illness or pregnancy, the employee is permanently or temporarily (generally, for more than seven days) unable to perform the regular duties of her job with the covered employer or any other job or occupation for which, given her training and experience, she is reasonably qualified (i.e., an “any occupation” disability definition); and (b) the employee currently receiving medical or chiropractic treatment for such disabling condition.

However, the Mandate does not cover disabilities resulting from a work-related injury or illness, an automobile accident, a premeditated or intentionally self-inflicted injury or illness, or an injury or illness suffered during the commission of a crime. Sections 2(g) and 3(g) of Act 139, 11 L.P.R.A. §202(g) and §203(g). For example, rather than been covered by SINOT, work-related disabilities are covered by Puerto Rico's workers' [compensation rules](#), and disabilities resulting from car accidents are generally covered by the rules of the Puerto Rico's [Automobile Accidents Compensation Administration](#) or "ACAA", which are also outside the scope of this article.

## **5. Covered Benefits**

A major problem with SINOT, and probably the main reason why most employers prefer to comply with the Mandate through an STD plan, is the meagerness of its benefits. Basically, SINOT benefits are as follows:

a) In the event of the covered employee's disability, the PR-DOL will pay the employee a weekly salary continuation benefit ranging from \$12.00 to \$113.00 for a maximum of 26 weeks, with the exact amount being determined by the employee's taxable wages for the basic year. Section 3(d)(1) of Act 139, 11 L.P.R.A. §203(d)(1). Since the \$113.00 weekly maximum kicks in at annual taxable wages of only \$9,000, this means that, through SINOT, most, if not all, employees will only receive up to 26 weekly payments of \$113.00 each, which is below the federal poverty guidelines and generally insufficient to support a household.

b) In the event of the covered employee's dismemberment, the PR-DOL will pay the employee a lump sum ranging from \$2,000 to \$4,000, with the exact amount being determined by the nature of the employee's injury. Section 3(f)(2) of Act 139, 11 L.P.R.A. §203(f)(2).

c) In the event of the covered employee's death, the PR-DOL will pay the beneficiaries of the employee a lump sum payment of \$4,000. Section 3(f)(1) of Act 139, 11 L.P.R.A. §203(f)(1).

## **6. Claim for Benefits**

The disabled employee or her authorized representative, not the employer, is responsible for requesting the payment of disability benefits under SINOT by filing PR-DOL's [Form DI-1, Application for Disability Benefits Covered by Act 139](#). As part of the application process, however, the employer will have to assist the employee by completing part B of Form DI-1, *Employer's Report*.

Ordinarily, Form DI-1 must be filed with the PR-DOL within three months of the beginning of the employee's disability, but PR-DOL officials have ample discretion to extend the filing due date for good reasons, such as when the delay was a direct consequence of the employee's disability.

## **7. Noncompliance Penalties**

An employer's failure to provide short-term, non-occupational disability benefits to its Puerto Rico employees, either through SINOT or a STD plan, may result in a PR-DOL fine of up to \$1,000 per covered employee for each year of noncompliance without a statutory maximum. Section 11(d) of Act 139, 11 L.P.R.A. §211(d).

## **STD Plan Alternative**

Rather than participating in SINOT, employers may comply with the Mandate by establishing their own STD plans, provided that: (1) the STD plan is equal to or better than SINOT, which in practice is always the case; and (2) PR-DOL approves the STD Plan as a replacement to SINOT. Section 5(a) of Act 139, 11 L.P.R.A. §205(a), PR-DOL's SINOT [Regulation No. 2](#) (Nov. 4, 1983).

The STD plan may be either fully insured through an insurance company licensed in Puerto Rico or self-funded by the employer, but most of them are fully insured mainly because replacing SINOT with a self-funded STD plan requires the employer to post a bond with the PR-DOL in an amount equal to 0.5% of the first \$9,000 of the taxable wages of all its covered employees for the immediately preceding calendar year.

Contrary to retirement plans benefiting Puerto Rico employees, STD plans do not have to be filed with the Puerto Rico Treasury Department for their local tax qualification and are not subject to any sort of nondiscrimination testing requirements.

### **1. STD Plan vs. SINOT Comparison**

The STD plan must cover all the employees protected by the Mandate (i.e., all non-seasonal Puerto Rico employees not classified as chauffeurs) or, with the PR-DOL's prior written approval, a reasonable subsection of the entire workforce; provide benefits upon disability, dismemberment, and death that are equal to or better than those available under SINOT; and not require employee contributions higher than the employee share of SINOT insurance premiums (i.e., 0.3% of the first \$9,000 of taxable wages). However, if as is oftentimes the case, the STD plan provides disability or AD&D benefits that are higher than or different from those under SINOT, employees may be required to pay an additional contribution for those better-than-SINOT benefits. Although not legally required to do so, for business and employee relations reasons some employers assume the full cost of the STD plan.

If the STD plan requires covered employees to pay a share of the premiums, then the employer must first obtain the employees' written consent to replace SINOT with the STD plan. For that, the employer, or for fully insured plans, the insurance company ensuring the STD plan, must use PR-DOL's Form SI-

18, *Employees' Consent to the Establishment or Modification of a Private Plan*, which, interestingly, must be signed in blue ink. Form SI-18 is unavailable online, but it can be obtained by calling the PR-DOL's SINOT Program at Tel. (787) 754-5840, or through a written request to: SINOT Program, PO Box 195540, San Juan, PR 00919-5540. The employees' written consent is not needed if the STD plan is noncontributory.

## **2. PR-DOL's Approval**

The employer must request the PR-DOL's prior written authorization to replace SINOT with an STD plan by filing PR-DOL's Form SI-14, *Request for Approval of, or Modification to, Private Plan*, together with the hard copy original of Form SI-18, if applicable. Also, if the STD plan is self-funded, the request must include PR-DOL's Form SI-17 *Request for the Administration of a Self-Funded Private Plan*. Forms SI-14 and SI-17 are also unavailable online but may be obtained by contacting the SINOT Program, at the address above. For fully insured STD plans, the insurance company issuing the corresponding insurance policy is usually responsible for handling the PR-DOL's approval process, whereas for fully funded STD plans that responsibility falls with the employer.

Forms SI-14 and SI-17 do not require payment of a filing fee and, if the application is complete, it takes about two months for the PR-DOL to complete its administrative review and approve the request. The SINOT coverage requirement runs on a fiscal year beginning on July 1st and ending on June 30th. Therefore, to replace SINOT with an STD plan for the immediately following fiscal year, the employer must file Form SI-14 with the PR-DOL by April 30th of the current fiscal year.

## **3. ERISA Considerations**

As employee welfare benefit plans under ERISA §3(1), STD plans replacing SINOT are subject to the reporting and disclosure, fiduciary responsibility, and administration and enforcement provisions of Parts 1, 4, and 5 of Title I of ERISA, respectively.

In this regard, employers should be aware that the certificates of insurance that insurance companies provide for fully insured STD plans are generally not considered ERISA-compliant summary plan descriptions or SPDs because they do not include many of the disclosures and information that ERISA §102(b) and 29 C.F.R. §2520.102-3 require for SPDs. Since in accordance with ERISA §502(c), the failure to provide plan participants with a valid SPD may result in penalties of up to \$110 per each noncompliance day, employers that meet the Mandate through an STD plan rather than SINOT must make sure that their STD plan has an ERISA-complaint SPD. While insurance companies usually handle the PR-DOL's STD plan approval process and may even assist with providing the SPD to plan

participants, seldom, if ever, do they prepare the SPD. Preparing an ERISA-compliant SPD is the employer's responsibility.

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