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Outsourcing Under the New Venezuelan Labor Law

By Emma Neher

The recent amendments to Venezuela's Organic Labor Law impact local and multinational employers in many aspects, especially with regard to the practice of *outsourcing*. The new Organic Law of Labor and Workers (known as the "LOTTT," its Spanish acronym) became effective on May 7, 2012, and generally prohibits outsourcing, defined as "fraud or deceptive practices committed by employers, for the purpose of distorting, disregarding or impeding the implementation of labor laws." The LOTTT charges the Ministry of Labor with the responsibility of investigating alleged violations and imposing sanctions under the law.

Specifically, the LOTTT prohibits contracting through a third party for services to be performed on a permanent basis and carried out within the beneficiary's premises, when the services are directly related to the beneficiary's production process, and the beneficiary's operations would be affected or disrupted without such services. Additionally, the law prohibits hiring workers through intermediaries or entities created by the employer for the purpose of avoiding the employer's obligations or undermining the employment relationship. Therefore, neither intermediation (*i.e.*, the simple provision of personnel) nor the use of professional services agreements is allowed when the underlying agreement is entered into with the intent to disguise an employment relationship. A requisite element for these prohibitions is the **intent to defraud** or evade employment obligations.

Notably, the LOTTT allows an implementation period of three years, *i.e.*, from May 7, 2012 to May 7, 2015, for the beneficiary of the service to absorb the "outsourced" workers into the beneficiary's payroll. During the implementation period and until the date of their incorporation into the payroll, outsourced workers cannot be dismissed and are entitled to the same benefits and working conditions applicable to the beneficiary's employees.

Key Provisions of the LOTTT with Regard to Outsourcing

Joint Liability for Contractor and Beneficiary of Service

It is important to note that hiring contractors is not per se prohibited under the LOTTT, as long as the service to be performed under the contract is carried out using the contractor's own resources and employees. Nonetheless the law provides that the contractor and beneficiary of the service may be held jointly liable for all employment-related obligations if the service is deemed "inherent" or "connected" to the beneficiary's business.

A service is “inherent” or “connected” to the beneficiary’s business when the activity is of the same nature or closely related to the beneficiary’s activities, or if the volume of activities for the benefit of one client is the contractor’s primary source of profit. In such cases, the contractor and beneficiary will be jointly liable for all employment obligations and the contractor’s employees will be entitled to the same benefits available to the beneficiary’s personnel.

Enforcement Powers of the Administrative Authorities

The Labor Inspector is empowered to commence an inspection to determine whether an outsourcing activity or a violation of the LOTTT has occurred. Where a company is found to have “outsourced” a worker, it will be liable for sanctions and criminal penalties, as described below. Additionally, the Labor Inspector may issue an order of “*reenganche*” (or “reinstatement”) for the company to “absorb” or incorporate the outsourced worker into its payroll, even if the worker was never a part of that company’s workforce.

A company’s failure to comply with an order of *reenganche* will have severe consequences. First, the company’s representatives will be subject to a criminal investigation and/or imprisonment. Additionally, a company’s appeal to challenge an order of *reenganche* will be rejected unless it first establishes compliance with the order.

Further, and what may be the most draconian aspect of this new law, the Labor Inspector and even lower-ranked agents now are vested with broad powers to summon the police or the military to enforce an order. If the company suspends its activities or ceases operations, the labor authorities also may, in their own discretion and without affording the company any type of due process, issue orders of appropriation for the government to occupy or take over the operation of a company alleged to be in violation of the law.

Sanctions and Criminal Penalties

Sanctions and criminal penalties may be imposed on an employer found to have committed fraud or engaged in an outsourcing activity after the three-year implementation period. The fines may range between 120 and 360 tax units (approximately USD \$2,500 to \$7,500). Additionally, an employer who fails to comply with or obstructs the enforcement of an order issued by the Labor Inspector may face imprisonment for a period of six to 15 months.

RECOMMENDATIONS

Although the LOTTT has established a legal distinction between outsourcing (a prohibited activity) and the provision of services by a contractor (which is permitted), whether a company is engaged in outsourcing will be determined by factors yet to be identified by the labor authorities and the courts. We expect the LOTTT regulations will include specific guidelines and criteria for analyzing and determining when outsourcing has occurred, or whether an activity was conducted with an intent to defraud or circumvent employment and labor laws.

In the interim, during the three-year implementation period, companies should assess their compliance with the law. To that end, where a third party has been contracted to provide services, companies should determine whether the third party: (i) qualifies as a “contractor” within the meaning of the law; (ii) performs services using its own resources and employees; and (iii) assumes all risks and costs related to conducting those activities.

With regard to the services provided by the third party under a contract, factors that companies should evaluate include: (i) the type of activity being performed by the contractor; (ii) the place where the services are being performed; (iii) the volume of income generated by the contractor for such service; (iv) the duration and permanency of the services provided through the third party; and (v) the benefits granted by the contractors to their personnel.

As a contractor and beneficiary of services may be held jointly liable for employment obligations, companies should also assess the impact of having to “absorb” outsourced workers (by incorporating the contractor’s personnel into the beneficiary’s payroll) in the event that the labor authorities determine that outsourcing has occurred in violation of the law. For purposes of calculating the risk exposure, the relevant period will be from May 7, 2012, to May 7, 2015, when the three-year implementation period ends.

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