

## LEGAL NOTE

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April 26, 2021

To: Clients and Friends

Re: Amendments to the regulation of Outsourcing

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On April 23, 2021, the Decree (“Decree”) that amends, adds and repeals several provisions of the following federal statutes relating to Outsourcing and Insourcing was published in the Official Gazette of the Federation: (i) the Federal Labor Law (*Ley Federal del Trabajo*; “FLL”); (ii) the Social Security Law (*Ley del Seguro Social*; “SSL”); (iii) the National Workers Housing Fund Law (*Ley del Instituto del Fondo Nacional de la Vivienda*; “INFONAVIT Law”); (iv) the Federal Tax Code (*Código Fiscal de la Federación*); (v) the Income Tax Law (*Ley del Impuesto Sobre la Renta*); (vi) the Value Added Tax Law (*Ley del Impuesto al Valor Agregado*); (vii) the Public Administration Officials Labor Relations Law (*Ley Federal de los Trabajadores al Servicio del Estado del Apartado B del artículo 123 de la Constitución Política de los Estados Unidos Mexicanos*); and (viii) the Central Bank and Public Banking Officials Labor Relations Law (*Ley Reglamentaria de la Fracción XIII Bis del Apartado B, del Artículo 123 de la Constitución Política de los Estados Unidos Mexicanos*).

The Decree became effective on the day following its enactment in the Official Gazette of the Federation, consequently, the new regulation will be enforceable for all employers in Mexico as of April 24, 2021, except as follows:

- Articles Fourth, Fifth, and Sixth of the Decree, related to the amendments to the Federal Tax Code, the Income Tax Law and the Value Added Tax Law, will become effective on August 1, 2021.
- Articles Seventh and Eighth of the Decree, related to the amendments to the Public Administration Officials Labor Relations Law and the Central Bank and Public Banking Officials Labor Relations Law, will become effective on January 1, 2022.

A. Purpose of the Decree

The Decree’s main purpose is to strengthen the Outsourcing and Insourcing framework by imposing new obligations and requirements to the parties subject to the Decree.

B. Parties subject to the Decree

The parties subject to the Decree are: (i) the hiring party, (ii) the service provider, and (iii) the recruitment agencies or intermediaries.

C. Relevant aspects of the Decree related to Labor, Social Security, Tax and Criminal Law

a) Prohibition to outsource personnel in the private and public sectors. The Decree allows to only outsource specialized services or works and/or complementary or shared services or works, provided that these are not part of the hiring party's core business or main activity, and that the service provider is registered before the Specialized Services Providers Registry (the "Registry") of the Ministry of Labor and Social Welfare (*Secretaría del Trabajo y Previsión Social*; the "Ministry of Labor").

b) To allow the parties to comply with the new regulation, the Decree sets forth that in an employment substitution process the requirement of transfer of assets will not be enforceable, provided that: (i) the employment substitution takes place between entities within the same corporate group; (ii) the service provider transfers its employees to the entity beneficiary of the services; (iii) the hiring party honors the seniority and employment rights granted to the transferred employees before the employment substitution takes place; and (iv) the employment substitution occurs within the following 3 months as of April 24, 2021.

c) The employees will continue participating in the company's taxable profit-sharing; however, the Decree sets forth the following limit to profit-sharing payment: (i) 3 months of the employee's salary, or (ii) the average amount received by the employee during the last 3 years for profit-sharing. As a matter of law, the employer will pay the higher amount that results more beneficial for the employee.

d) The service provider shall not be allowed to register its employees before the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*; "IMSS"), under a specific risk class for each service or activity provided to the hiring party.

e) Payments made to a service provider duly registered before the Registry for specialized or complementary services or works that are not part of the hiring party's core business or its main activity will be deductible and creditable for Income Tax and Value Added Tax ("VAT") purposes, as long as, both parties meet the requirements set forth by the Income Tax Law and the Value Added Tax Law.

D. Main Obligations of the Parties

The hiring party shall:

a) Execute in writing a services agreement, which must set forth the services and works to be performed, and specify the number of employees approximately.

b) Allow labor inspectors to conduct on-site inspections to verify the new outsourcing regulation's compliance and cooperate with the inspectors during such diligence.

c) Obtain from the service provider the information required by the Income Tax Law and the Value Added Tax Law. Both regulations set forth that the hiring party shall obtain from the service provider the following information: (i) evidence of registration at the Registry; (ii) the digital salary tax receipts of the employees who perform the service or work; (iii) the corresponding tax returns; (iv) evidence of payment of social

security contributions; (v) copy of the service provider's tax return; and (vi) evidence of the consideration's payment for the service provided and the VAT transferred.

The service provider shall:

- a) Register before the Registry.
- b) Inform the IMSS and the National Workers Housing Fund (*Fondo Nacional de la Vivienda para los Trabajadores*; "INFONAVIT") on a quarterly basis, of the existent services agreement.
- c) Provide the hiring party the information required by the Income Tax Law and the Value Added Tax Law no later than the last day of the following month in which the hiring party paid for the services rendered and the VAT was transferred.

#### E. Non-compliance and Penalties

If the service provider breaches any of the obligations imposed by the new outsourcing regulation, then the hiring party will be jointly liable with the service provider in respect to the latter's employees for labor, social security and tax obligations.

The non-compliance of the new outsourcing regulation will be sanctioned as follows:

- a) Labor. The Ministry of Labor will impose a penalty of 2,000 to 50,000 times the value of 1 UMA equivalent to a minimum of Mx\$179,240.00 to a maximum of Mx\$4'481,000.00 (approximately US\$8,962.00 to US\$224,050.00) to anyone who: (i) outsources personnel; (ii) provides services or works that are not specialized and/or is not registered before the Registry; and (iii) hires and benefits from outsourced services or works in violation of the new regulations.
- b) Social Security. The IMSS will impose the service provider a penalty of 500 to 2,000 UMAS, equivalent to a minimum of Mx\$44,810.00 to a maximum of Mx\$179,240.00 (approximately US\$2,240.50.00 to US\$8,962.00).
- c) Tax. The Tax Authority will impose the service provider a penalty equivalent to a minimum of Mx\$150,000.00 to a maximum of Mx\$300,000.00 (approximately US\$7,500.00 to US\$15,000.00).
- d) Criminal. The individual or entity who uses or benefits from fraudulent schemes of specialized services or works, or outsources personnel, will be criminally prosecuted for tax evasion.

#### F. Transitory Articles

The Transitory Articles set forth the following terms:

- a) The Decree will become effective on the day following its publication in the Official Gazette of the Federation, this means, on April 24, 2021.

- b) Within the following 30 days as of April 24, 2021, the Ministry of Labor shall issue the guidelines for the service provider's registration before the Registry.
- c) Within the following 2 months as of April 24, 2021, the INFONAVIT will issue the corresponding rules for the service provider to file the information requested by such Institute.
- d) Within the following 3 months as of April 24, 2021, the entities part of a corporate group operation with an outsourcing scheme shall transfer their personnel through an employment substitution process.
- e) Within the following 3 months as of April 24, 2021, the employers shall deregister from the employers registries by classes required prior to the enactment of the Decree, and if requested file again for their registration.
- f) Within the following 3 months as of April 24, 2021, the service provider shall provide the information requested by the IMSS.
- g) Within the following 4 months as of April 24, 2021, the service provider shall register before the Registry.
- h) The felonies committed before April 24, 2021, will be ruled in accordance with the law in effect on the date when the offense was committed.
- i) The new obligations arose from the amendments to the tax legislation will become effective on August 1, 2021.

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