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Warning for Venezuelan Employers: The Deadline to Incorporate Outsourced Workers into the Payroll as Employees is Approaching

Employment and Labor



Corporations often optimize costs by engaging third-party providers or contractors to perform certain services rather than hiring employees to carry out the same services. Some of these services are temporary and specific, so corporations do not wish to hire a professional as an employee to perform the work. Although this may be perfectly valid under certain circumstances, it is important to bear in mind that the rules of each country may vary so that risks associated with this practice will also vary from one jurisdiction to another.

The Venezuelan Labor Law for Workers (known as LOTTT in its Spanish acronym), in force since 2012, has established some restrictions on outsourcing. Among the most important provision of the LOTTT is an employer's obligation to absorb outsourced workers into the company's payroll as employees before May 7, 2015.

For these purposes, the LOTTT defines outsourcing as a simulation or fraud by an employer in order to distort, ignore or obstruct the application of Venezuelan labor legislation. Administrative or judicial authorities have the authority to establish a corresponding liability.

Outsourcing prohibitions

The LOTTT prohibits the following activities, which are considered to be outsourcing:

1. Contracting with a legal entity to perform work, services or activities that are performed permanently within the contracting company's premises. To be considered outsourcing, such activities must be directly related to the core business of the contracting company and of such importance that without their execution its business would be interrupted or affected;
2. Hiring of workers through intermediary companies to evade the labor obligations;
3. The constitution of legal entities by the employer to evade the labor obligations;
4. Fraudulent contracts or agreements for the purpose of disguising the labor relationship as some other type of legal relation (such as civil or commercial); and
5. Any other form of labor subterfuge or fraud.

Therefore, under the LOTTT, directly or indirectly providing personnel or contracting with a third party to provide services would not be allowed if the real purpose of the agreement or arrangement is the evasion or obstruction of Venezuelan labor legislation (e.g., to avoid payment of seniority benefits or to pay lower salaries or benefits). The LOTTT places special emphasis on the employer's intent to defraud, as the principal purpose of the law is to protect workers from being hired in a way that may deprive them of the benefits of labor protections.

Contractors

On the other hand, the LOTTT does not consider the contractor to be an outsourcing entity as long as it performs jobs or services using its own resources and has workers under its control. However, there is a joint responsibility if the contractor performs work or services inherent to (meaning, of the same nature as) the contracting company or related to (meaning, in close connection with or produced as a consequence of) the core business of the contracting company.

The LOTTT also considers as inherent or related those activities or services performed on a regular basis by the contractor for the contracting company in a way that constitutes the contractor's main source of profit. This joint responsibility extends to workers hired by a subcontractor, even if the contractor was not authorized to subcontract. Such workers are entitled to receive the same benefits

as the workers of the contracting company.

Effects of the outsourcing

Activities deemed to be outsourcing are subject to the following:

1. The beneficiary of the services must incorporate outsourced personnel into its payroll as employees before May 7, 2015;
2. Outsourced employees are entitled to receive salaries and benefits paid by the beneficiary of the service to its own workers;
3. Outsourced workers are protected against dismissals until their effective incorporation into the beneficiary's payroll, and
4. The beneficiary of the services will be considered the real employer of the outsourced employees.

Powers of the labor authority

Under the LOTTT, the labor inspector has the power to inspect a business to determine whether or not its activities might be considered to be outsourcing in violation of the LOTTT provisions. Although the LOTTT does not establish any specific procedure for outsourcing cases, in practice, once an outsourced worker files a claim before the administrative authority, the labor Inspector will conduct an inspection at the contracting company's premises and request any documents considered relevant to the case.

During the process, the labor inspector might issue a preliminary order to prevent the company from terminating any type of relationship with the contractor or third party until a final decision is issued. This means that the contracting company would be obligated to continue the contract for services even if such services are terminated or are no longer needed. If outsourcing is found in its final decision, the labor inspector might issue a "reinstatement" order obligating the contracting company to incorporate the outsourced worker into its payroll, even if the worker was never part of that company's workforce.

Failure to comply with the "reinstatement" order has its own consequences. The company's representatives (including its board of directors) might be subject to criminal investigation and/or imprisonment for six to 15 months. Additionally, the company must comply with the reinstatement order before filing any action against the order with a labor court; otherwise, such action will be rejected. Finally, the labor authority may revoke the employer's "labor clearance," which is necessary to comply with other important labor obligations.

The LOTTT also grants the labor inspector charged with executing an order the power to request intervention by the police or the use of military force to enforce an order in the event there is any obstruction by the employer. In the most extreme case, if the company suspends its activities or ceases operations in Venezuela, the labor authorities may also, at their own discretion and without granting the company any type of due process, issue orders of appropriation that will result in the government occupying or taking over the operation of a company alleged to be in violation of the law.

If the labor inspector considers activity to be outsourcing after May 7, 2015, the contracting party will be subjected to a fine of between 120 and 360 tax units (approximately US\$293.07 to \$879.23).

Recommendations

Although the LOTTT expressly defines activities that are considered outsourcing and, thus, prohibited, there is currently no judicial decision that analyzes in depth the elements that might lead the authorities to consider when contracting a third party to render services is a fraud or subterfuge, or when the activity is considered to have been engaged with the intention to defraud or obstruct the application of the Venezuelan labor legislation.

Taking into account that the time period to absorb any possible outsourced worker into the contracting company's payroll is about to expire, it is possible that most corporations that have engaged services with a third party or contractor will face claims from workers alleging an employment relationship with the contracting company. Corporations should bear in mind that the existence of a contract between the contractor and the contracting company or a third party would not be enough to prevent the labor authority from determining that outsourcing has occurred. Under the Venezuelan labor legislation, the authorities are not obliged to respect the provisions of an agreement between the parties if, in fact, the services are performed in a way that constitute any of the prohibited activities.

Companies should, therefore, assess their compliance with the law and the risks associated with service contracts, taking into account facts and circumstances without limiting this assessment to the terms of the agreement between the parties. Whenever a third party has been engaged to perform any kind of services, contracting companies should determine if the third party: (1) qualifies as a contractor under the definition of the LOTTT; (2) performs services independently, with its own resources and employees under its own direct supervision; and (3) assumes all risks associated with the activities performed.

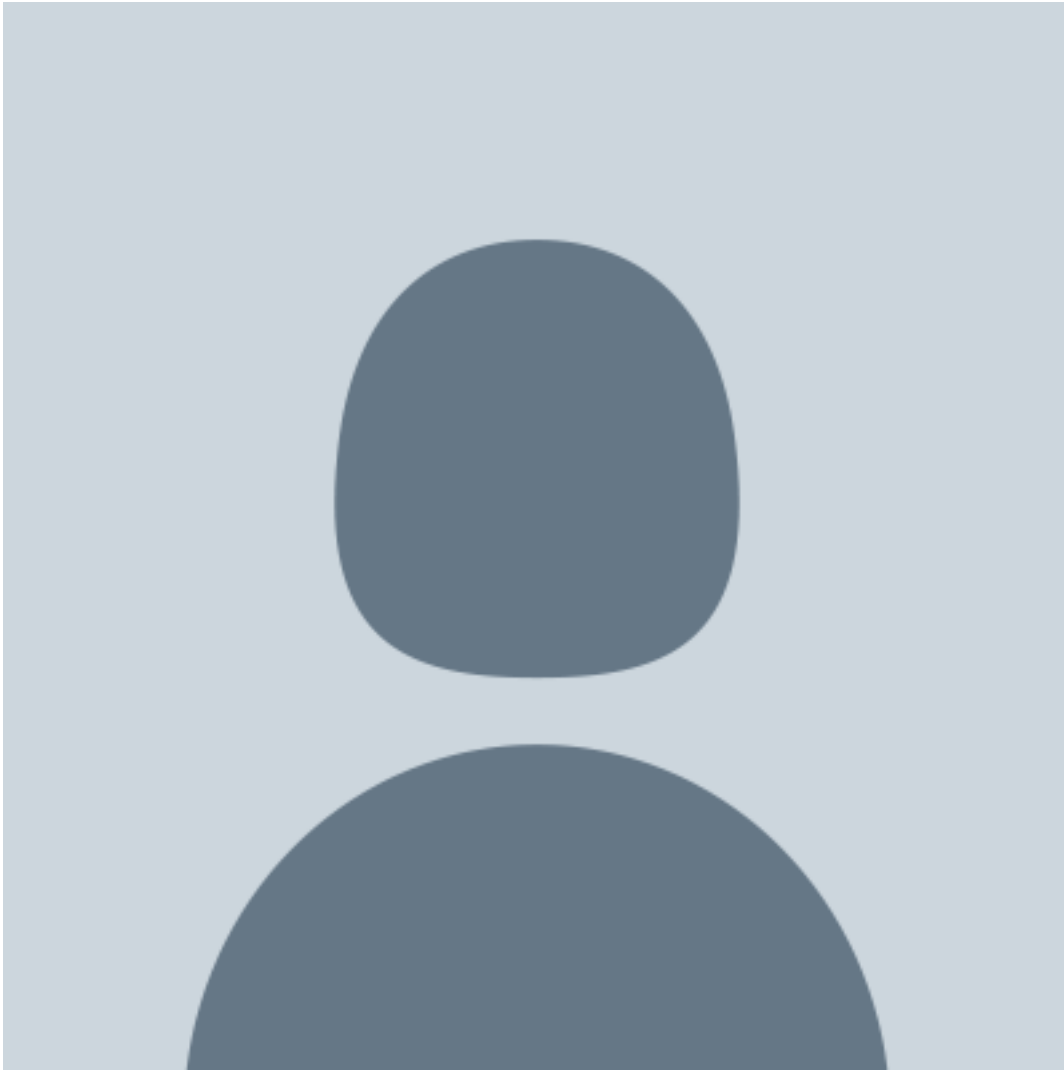
When services are provided under a contract between the parties, companies should also assess: (1) the nature of activities performed by the contractor; (2) the place where the services are being performed (outside or within contracting company's premises); (3) the relevance of the activities performed by the contracting party to the company's business; (4) the amount of income generated by the contractor from such services; (5) the duration and permanency of the services provided through the third party; and (6) the benefits granted by the contractors to their personnel.

Finally, taking into account that the contractor and the contracting company may be held jointly liable for employment obligations, companies should also assess the impact of having to incorporate any outsourced worker (contractor personnel) as employees on the company's payroll in the event the labor authorities determine that outsourcing has occurred in violation of the law. To calculate any possible risk, the company should consider the benefits granted to its own personnel, for the period from May 7, 2012, to May 7, 2015, the date when the three-year implementation period ends.

ABOUT THE AUTHOR

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