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EY TAX Flash

Approval of bill on subcontracting

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On April 20, 2021, the Upper Chamber of the Congress of the Union approved the ruling by which several articles of the Federal Labor Law, the Social Security Law, the Law of the National Workers' Housing Fund Institute, the Federal Tax Code, the Income Tax Law and the Value Added Tax Law are added and repealed. It is important to mention that it had already been previously approved by the Lower Chamber on April 13, 2021; therefore, in order for it to become law, it is only pending for the Executive Branch to enact it and order its publication in the Official Gazette of the Federation.

The main points in labor matters are:

- ▶ The prohibition of **subcontracting personnel** considered as the service consisting of an individual or legal entity providing or making available its own workers for the benefit of another.
- ▶ The regulation and permissibility of subcontracting **specialized services and works** other than the corporate purpose and the **main** economic activity of the contracting company.
- ▶ **Complementary or shared services or works** rendered **between companies of the same business group** will also be considered as specialized as long as they do not form part of the corporate purpose or the main economic activity of the company receiving them.
- ▶ The obligation of specialized services and works providers to **register with the Ministry of Labor and Social Welfare** (STPS, for its acronym in Spanish), which will include them in a **public registry** of specialized services and works subcontracting companies.
- ▶ The STPS must respond to the request for registration of specialized services within 20 business days following the request, in case this does not occur within such term, the applicant will have three days to request the STPS to respond to the request; after the term, **in case the STPS does not notify a resolution, the registration will be deemed to have been made** for all legal purposes.

- ▶ If the specialized service provider fails to comply with its obligations to its workers, **the beneficiary of the service will be jointly and severally liable.**
- ▶ The individual amount of profit sharing for each employee will be capped at the amount resulting from the sum of **three months of the employee's salary**, or the **average** of the profit sharing received in the last **three years**, whichever amount is more favorable to the employee.
- ▶ The **transfer of the assets** of the company or establishment from the substituted employer to the substitute employer is added as a requirement for the validity of the **employer substitution.**
- ▶ Companies operating under a subcontracting regime at the time of the entry into force of the reform will have a term of **90 calendar days**, from the entry into force of the bill, to transfer the workers from the company providing the service to the beneficiary of the service, without the transfer of the assets of the company or establishment being a requirement. The beneficiary company of the service shall acknowledge the labor rights of the transferred workers, including their seniority.
- ▶ The STPS will issue the general provisions that determine the procedures related to the public registry of subcontracting companies of services and specialized works within **30 calendar days** following the entry into force of the bill.
- ▶ Individuals or legal entities that provide specialized subcontracting services and works must obtain registration before the STPS within **90 calendar days** from the publication of the general provisions referred to in the previous item.

In **tax matters**, there are no changes in the ruling issued by the Upper Chamber, that is, the specialized service provider must comply with the following: the specialized service provider must: process its registration certificate before the STPS, issue the CFDI payroll for the payments made to its workers, make the withholding of taxes and pay them in due time and form, also make the payment of social security and INFONAVIT contributions and, finally, with regard to the obligation to withhold 6% VAT, this is eliminated and the VAT return and its payment receipt is included as an additional receipt.

In addition to the new requirements provided in the reform, expenses related to specialized services shall comply with the other items of income tax deductions and with the guidelines for VAT crediting, such as: strict indispensability, tax receipts and proper accounting records, among others.

On the other hand, it can be seen that there are elements referring to the different treatment given to the public sector with respect to the private sector in terms of transition periods, which could violate the fundamental right to equality, since it is established that for the public sector the reform will enter into force until 2022, while the private sector is only granted a period of 90 days, which could be insufficient.

The main changes in **social security** and **INFONAVIT** are:

Mexican Institute of Social Security (IMSS, for its acronym in Spanish)

- ▶ In addition to considering as an infraction the failure to file the information that will be required every four months by the Social Security Law, in its Article 15 A, **it will also be considered as an infraction the filing outside the deadlines indicated** and, in case of non-compliance, fines between **500 and 2000 times the Unit of Measure and Update (UMA, for its acronym in Spanish)** (\$44,810.00 and \$179,240.00, respectively) will be considered. The term to begin with the presentation of this information will be **90 days after the entry into force of this decree.**
- ▶ There is a term of 90 calendar days from the date this decree enters into force to **cancel the employer registrations by class (national)** and request the corresponding local employer registrations. At the end of this term, IMSS will cancel them.
- ▶ In the event of Employer Substitution given to the transfer of employees of companies operating under the labor subcontracting regime during the first 90 calendar days of the entry into force of this decree, some assumptions are provided for determining the Class, Fraction and Premium of the Occupational Risks Insurance:

- A. To determine the Class and Fraction of the company that absorbs the workers, it **must be classified according to its activity** and based on the catalog of activities of the Regulations, **keeping the same Occupational Risk Premium when the company that had the workers has been correctly classified**, otherwise they will contribute with the average premium that corresponds to them.
 - B. When by virtue of absorbing workers from other companies of the same or different class, **they must adjust their classification to the new activities**, in addition to determining the corresponding class and fraction, the risk premium will be obtained through a specific premium weighting procedure based on the salaries and risk premiums of all the workers and employer registrations involved.
- ▶ The companies that have, at the date of entry into force of the decree, subrogation of services and Reversion of Contributions agreements in force, **these will not be subject to modification** when they carry out the employer substitution within 90 days provided for in the decree.

- ▶ The deadline for submitting the information required by INFONAVIT regarding service contracts or specialized works is extended to be **every four months**, no later than the 17th day of the months of January, May and September. The deadline to start submitting this information will be no later than 60 days after the entry into force of the decree.

In terms of the legislative process, the bill was sent to the executive branch for its publication in the Official Gazette of the Federation.

Once the bill becomes effective, according to the aforementioned provisions, there will be substantial impacts on companies that receive or provide services for which personnel are made available, regardless of whether the service is provided or received by a related party or a third party. Based on the foregoing, we consider it relevant to carry out a detailed multidisciplinary analysis of the possible effects that the referred bill could have on the operations of the companies.

INFONAVIT

- ▶ The INFONAVIT Law provides for a reduction from two years to only three months in cases of employer substitution, where the substituted employer will be jointly and severally liable with the new employer for the obligations derived from the Law.

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