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Legal

Update in labor subcontracting and REPSE matters

1. Criteria's published by the SCJN on labor subcontracting.

In recent weeks, the Supreme Court of Justice of the Nation (SCJN) has published several relevant case law and non-binding court precedents on labor outsourcing. We invite you to learn about their content.

- **Thesis 2a./J. 98/2023(11a.). The Agreement that sets up the general provisions on REPSE does not violate the principle of legal certainty.** The Second Chamber of the SCJN determined that the Agreement by which the general provisions for the registration of natural or legal persons who provide specialized services or carry out specialized works referred to in Article 15 of the Federal Labor Law (hereinafter, the "General Provisions"), published in the Official Journal of the Federation (DOF) on May 24, 2021, does establish the necessary information to register in the REPSE, so legal certainty is not violated.

- **Thesis 2a./J. 93/2023 (11a.). The requirement to supply the geolocation of the employer's domicile is not contrary to the rights of privacy and protection of personal data.** The SCJN decided that the General Provisions oblige the employer to provide a piece of information with the purpose of corroborating the existence and location of the labor establishment, which helps to avoid the incorporation of non-existent or simulated companies to the REPSE, a reason that obeys the main motivation of the subcontracting reform. Therefore, since this is the purpose of its requirement, it does not violate the rights of privacy and protection of personal data. Likewise, the safeguarding of information in the REPSE continues to follow the regulations on transparency, access to information and protection of personal data.

- **Thesis 2a./J. 83/2023 (11a.). The requirement of being up to date with tax and social security obligations is not contrary to the principles of legality and legal certainty.** The Second Chamber concluded that the requirement to be current in the compliance of tax and social security obligations is a proper measure to prevent subcontractors from evading compliance with these obligations. This under the consideration that it is not a generic and abstract requirement that gives rise to arbitrariness on the part of the STPS, but rather is related to the purpose of the REPSE, which is to ensure that contractors complies their obligations on time.

- **Thesis 2a./J. 89/2023 (11a.). The General Provisions do not contravene the principle of legal certainty because they do not specify the social security and tax obligations that each of the employers must follow.** The SCJN ruled that such provisions do not violate the principle of legal certainty since it does not require to establish in the law itself all the social security and tax obligations that employers must comply with in order to obtain and keep the registration. The labor authority is not competent to decide what these are, but rather such matter must be decided by the competent authorities in these matters (IMSS, INFONAVIT and SAT).

- **Thesis 2a./J. 97/2023 (11a.). The obligation to register in the REPSE does not constitute mandatory or forced labor.** The Court declared that such obligation is not an assumption of mandatory or forced labor, since it does not imply executing an activity for the benefit of another without the right to remuneration, but it is simply an administrative requirement that must be complied with by subcontractors.

- **Thesis 2a./J. 88/2023 (11a.). The omission to specify the manner in which the electronic signature must be safeguarded in the General Provisions does not violate the right to privacy and the protection of personal data.** The SCJN decided that such omission does not violate the aforementioned rights to privacy and protection of personal data since the requirement to provide an electronic signature only serves to access the website, through a secure and encrypted file with the validity of an autographic signature. In other words, there is no obligation to provide information that could compromise the security and privacy of the holder of the electronic signature.

- **Thesis 2a. VI/2023 (11a.). Unconstitutionality of the denial of registration when the specialized nature is not proven.** The Second Chamber declared the unconstitutionality of article 14, paragraph a) of the General Provisions inasmuch as such rule sets up as a cause to deny the registration that the applicant does not prove its specialized character. The foregoing because it is considered that article 15 of the LFT only confers to the STPS the power to issue provisions related to the registration procedure, which must adhere to the substantive framework provided by law, which is not considered to be complied with in such cases.

- **Thesis 2a. V/2023 (11a.). Unconstitutionality of the requirement to prove the specialized nature of the REPSE.** The Second Chamber declared the unconstitutionality of article 8, point 3, first paragraph, second part, second and third paragraphs of the General Provisions, since, as a result of the Reform on subcontracting matters, the Ministry of Labor and Social Welfare was only empowered to implement such identification list of subcontractors and the services or works that are subcontracted,

but not to request from such subcontractors requirements unrelated to such purpose, such as the accreditation of the specialized nature.

2. Criteria in the matter of prohibited subcontracting:

- **Thesis 2a./J. 95/2023 (11a.). The prohibition of subcontracting of personnel in terms of article 12 of the LFT is not contrary to the principle of legal certainty.** The Second Chamber concluded that there is sufficient information to know the reasons for which the outsourcing of personnel was prohibited, such as the ineffectiveness of the 2012 reform, the existence of undue practices and the increase of simulation schemes and abuses such as tax evasion, unfair competition, and affectation of the labor rights of the workers. In this sense, the reason for the prohibition was justified without violating the principle of legal certainty. In addition, the Court considered that since it is a general prohibition, it is not necessary to set up specific assumptions for the prohibition of personnel.

- **Thesis 2a./J. 96/2023 (11a.). The right to a hearing is not violated. The Court ruled that the prohibition of subcontracting does not violate the right to a hearing.** This is because it is a general rule, which applies without particular specifications or distinctions, and because it addresses a generalized problem, and therefore it is not possible to grant the opportunity to review specific cases of subcontracting to decide whether or not the rights of workers are respected.

- **Thesis 2a./J. 87/2023 (11a.). The prohibition does not affect the principles of legal certainty and security in the case of foreign investors.** The Court ruled that the prohibition of subcontracting is not contrary to the rights of legal certainty and security in relation to foreign investors. This is because the Agreements for the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of the Netherlands, and the USMCA do not prohibit Mexico from modifying its legal system.

- **Thesis 2a./J. 94/2023 (11a.). The joint and several liability attributed to the beneficiary for non-compliance in labor and social security matters by the contractor is not contrary to the principles of legal certainty and security.** The Second Chamber decided that the establishment of this joint and several liability seeks to facilitate and ensure the payment of the creditor in the event of constant non-compliance, fiscal or economic difficulties, fraud or simulations that affect the workers. Likewise, the beneficiary has contractual, legal, and administrative means at its disposal to verify compliance with labor and social security obligations.

- **Thesis 2a./J. 92/2023 (11a.). The prohibition of subcontracting of personnel and the permitting of subcontracting of services or specialized works do not violate the freedom of commerce.** The Second Chamber resolved that the reform in the matter of subcontracting does not contravene the freedom of commerce, since it is not an absolute prohibition, but rather it regulates such activity. Likewise, it is a proportional measure because it complies with a constitutionally valid purpose, it is suitable to achieve such purpose since it is allowed in the case of specialized services or works, there is no less harmful measure to protect the rights of the workers, and the degree of achievement of the purpose pursued is greater than the degree of affectation caused by the measure.

- **Thesis 2a./J. 90/2023 (11a.). The prohibition of subcontracting and the permitting of specialized services or works are not contrary to the principle of non-retroactivity.** The Court ruled that this principle is not violated since the persons performing the subcontracting services did not have an acquired right in relation to the form and modalities in which they should be rendered. Likewise, the subcontracting regulation does not restrict this activity, but imposes a new modality in the form in which they must adhere to for the subcontracting of specialized services. In addition, according to the theory of the components of the norm, there is no retroactivity, since Articles 12 and 13 of the LFT do not affect past factual situations, but rather are oriented to regulate those situations that arose after the entry into force of the challenged norms.

3. Criteria in matters of specialized services or works:

- **Thesis 2a./J. 91/2023 (11a.). Articles 15 of the LFT, 15-A of the Social Security Law and 29 Bis of the INFONAVIT Law do not violate the principle of reasonableness by setting up obligations and requirements to provide specialized services or works.** The Court decided that the aforementioned precepts set up various requirements whose main purpose is to prevent the labor subcontracting scheme from becoming a means to generate abuses and non-compliance in labor, tax, and social security matters. Likewise, considering that the information required by these precepts is related to the contracts for services or specialized works entered into by the contractors in accordance with their corporate purpose or predominant economic activity, and with the compliance with labor, tax and social security obligations derived from such activities, it is considered that their compliance does not imply disproportionate costs or burdens.

4. Criteria in social security matters, about the repeal of the second paragraph of article 75 of the Social Security Law:

- **Thesis 2a./J. 86/2023 (11a.). The repeal is not contrary to the principle of non-retroactivity.** According to the criteria of the SCJN, the repeal of this portion of the law does not affect any acquired right of the employers or past factual situations, and therefore does not contravene the principle of non-retroactivity. The repealed article established, among other matters, that for purposes of classification in the occupational risk insurance, employers engaged in subcontracting services could request the IMSS to assign an employer registry for each of the five classes indicated by the same Law.

- **Thesis 2a./J. 84/2023 (11a.). The repeal is not disproportionate.** The Second Chamber determined that the repeal of such portion of the law is proportional in the presence of a specialized labor subcontracting model, since it seeks to protect labor and social security rights of the workers, it is a rational means to achieve these purposes, it implies that the subcontracting companies register their workers according to the activities they perform, a situation that will have an impact on the amount of the premium for the labor risk insurance in favor of the workers. Likewise, it does not stand for an interference in the fundamental rights of the employers, since they have the possibility of continuing to register their workers in terms of the employers' registers established in the Law.

- **Thesis 2a./J. 84/2023 (11a.). The repeal does not violate the principle of legal certainty.** The Second Chamber decided that such repeal does not violate the principle of legal certainty, since this regulatory provision was compatible with the old model of subcontracting and not with the model of specialized services or works adopted after the reform. Thus, the current regulatory framework is congruent with the permitting of subcontracting services or specialized works, since the prohibition of subcontracting personnel in general does not justify having more records than the one that distinguishes the employer's activity.

5. Guidelines for REPSE renewal in 2024

In accordance with the second paragraph of Article 15 of the Federal Labor Law, individuals or companies that provide subcontracting services must renew their registration with the Ministry of Labor and Social Welfare. In this regard, at the beginning of this year it was announced that the Ministry will implement a series of actions that will allow such process to be carried out in an efficient manner.

To this end:

1. The amendments to the General Provisions establishing the renewal procedure will be published in January.

2. During the month of February, it is planned to disseminate this renewal procedure through social networks and the media; to hold talks with business organizations, as well as videos explaining the renewal process that will be available on the REPSE platform.

3. In March, the process of renewal of registration notices will begin.

The period of validity of the registration will be counted from

the date of registration, regardless of whether or not any update or modification of activities was made in the *REPSE*.

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