

Alert | Amendments to “Outsourcing” in Mexican Law



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Amendments to “Outsourcing” in Mexican Law

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On April 23, 2021, the Federal Government published in the Official Gazette the amendment of several provisions of the Federal Labor Law, the Social Security Law, the Law of the National Workers' Housing Fund (Infonavit), the Federal Tax Code, the Income Tax Law, the Value Added Tax Law (VAT), the Federal Law for State Employees, and the Federal Law regulating paragraph (b) of Article 123 of the Federal Constitution (collectively the "Amendments") to entirely modify the current regulation of personnel outsourcing.

Main Purpose

In general terms, the purpose of the Amendments is to prevent “outsourcing,” understood as a mechanism through which a beneficiary hires its required personnel through a third-party aiming to avoid or reduce employer’s liabilities and obligations under Mexican law. The Amendments’ goal is to incentivize companies benefiting from personnel to hire them directly, under labor agreements reflecting market conditions and that trigger the tax and social security contributions that correspond under applicable law.

Background

In Mexico, labor related and social security contributions have traditionally been perceived as high¹. In that context, for decades companies operating in Mexico have developed “outsourcing” mechanisms that have allowed them to reduce those costs. These mechanisms have also been used to reduce tax and sometimes mandatory profit-sharing impact on overall operational costs.

A first attempt to regulate the above-mentioned mechanisms was implemented in 2012. An amendment to the Labor Law introduced the so-called “intermediation,” which allowed a company to render services with its own employees to a third-party called “beneficiary.” The company that hired the personnel was directly responsible for social security and related costs, and the beneficiary would only be responsible if certain conditions were not met. However, the attempt was unsuccessful, and the Federal Government continued complaining about the impact of these mechanisms on public finances, particularly on the Social Security Institutes, and also to the employees’ legal and constitutional rights.

Representatives of the Federal Government and the private sector have been discussing a new proposal to address these concerns. This new attempt is based on the prohibition of “outsourcing,” as defined above, supported with specific fines, the non-recognition of the deductibility of the expenses for tax purposes of the beneficiary, and even the possibility of a criminal accusation for tax evasion.

Amendments

The amendments can be classified in 4 key groups: (i) the Labor Law, (ii) the Social Security Institute Law, (iii) the *Infonavit* Law, and (iv) other tax laws (income, value added tax, and the fiscal code).

Federal Law now forbids “outsourcing” – defined as the situation in which a company or individual supplies or makes personnel available for the benefit of another entity. This figure, which includes the use of companies known in Mexico as “*pagadoras*,” is now forbidden.

Companies will only be allowed to outsource services that fit within the description of specialized works or services if (i) those works or services are not included in the beneficiary’s corporate purpose or core activities and, thus, cannot be performed directly, and (ii) the services provider is registered in a new database to be developed by the Ministry of Labor under still-to-be-published rules.

A company would be able outsource specialized services to a subsidiary or affiliated if the same conditions are met.

Any individual or company outsourcing services without meeting those conditions will be fined², jointly liable for all labor obligations and, as mentioned below, will also be liable for social security contributions and will not be allowed to deduct the corresponding expense for purposes of income tax, or to credit the expense for VAT purposes.

The Social Security Institute Law now provides, in its new article 15-A, that companies providing specialized services or performing specialized works will now have to provide quarterly information to the Institute about their contracts and personnel. Failure to do so will result in specific fines. On the other

¹ This perception may not be entirely accurate. (see: <https://data.oecd.org/tax/social-security-contributions.htm>)

² Fines may be as high as 50,000 units, equivalent to US\$225,000 at a 20 Peso exchange rate.

hand, companies that contract with companies in breach of these obligations will be jointly liable vis-à-vis the Social Security Institute for all corresponding obligations.

The *Infonavit Law* was amended to closely track changes to the Social Security Institute Law. The amendments set forth obligations for companies providing specialized services and for the beneficiaries. The former have a reporting obligation regarding contracts and personnel providing specialized services, and the beneficiaries will be jointly liable vis-à-vis the *Infonavit* if its services supplier is in breach of its obligations.

On the tax side, the Tax Code, the Income Tax Law, and the VAT Law were all amended to deny deductibility for tax purposes of payments made by a beneficiary of “outsourced” services that are either related to the beneficiary’s corporate purpose or part of its core activities. Payments for “outsourced” services will only be deductible if the previously mentioned conditions are met; namely, they are referred to specialized services or works not included in the corporate purpose or core activities of the beneficiary, and if the supplier is registered before the Ministry of Labor. The Tax Code sets forth new fines for companies that try to deduct payments for “outsourced” services, and for service providers not properly registered. Furthermore, the Tax Code goes as far as to consider all structures that simulate the rendering of specialized services as tax evasion.

Relevant Dates

Amendments were enacted in the April 23 evening edition, so they will become effective on April 26, *except* for the amendments to the Federal Tax Code, the Income Tax Law and the Value Added Tax Law, which will become effective on August 1, 2021.

** This GT Alert is limited to non-U.S. matters and law.*

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