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COVID-19: Contract and employment issues in Chile

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This guide highlights key contractual, labor and other considerations that may affect business operations in Chile due to the COVID-19 outbreak

With the help of leading firms in each of the main jurisdictions in Latin America, we have prepared this note setting out the key aspects of the framework in each such jurisdiction. This is obviously a rapidly evolving situation that we are following closely.

How is the applicable law determined by the courts in the case of commercial contracts?

The courts first review the provisions of the agreement related to governing law. In the absence of specific provisions, if the agreement was executed in Chile between Chilean parties, the courts will apply Chilean law to govern in determining any conflict arising from the agreement.

In Chile a parties' governing law choice of non-Chilean law would be upheld by a Chilean court only if (i) the agreement is considered "international" as determined by the court and (ii) there is a connecting factor between the parties and their chosen law and forum.

Are there any statutory provisions relating to force majeure?

Article 45 of the Chilean Civil Code defines *force majeure* as an "unforeseen event that is impossible to resist". The Chilean Civil Code also provides several examples of *force majeure* events, such as shipwrecks, earthquakes, imprisonment of enemies and acts of authority executed by public officials.

Based on the provisions contained in the Chilean Civil Code, courts have construed that in order for a *force majeure* event to be considered as an exemption from liability, the following requirements should be met: (i) the event must be unforeseeable and impossible to resist; and (ii) the event must not be caused by the party which alleges the *force majeure* or must not occur due to the party being in a default situation.

How are force majeure clauses in commercial contracts applied and interpreted in practice?

Under Chilean law, *force majeure* is considered to be a general exemption to liability regardless if the parties have included or not included a specific clause addressing *force majeure* in the agreement.

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The parties are also entitled to include in their agreements specific provisions regulating or modifying the effects associated with a *force majeure* event or even including other events in addition to those set out in the Chilean Civil Code. Likewise, the parties may state that some specific events shall qualify as a *force majeure* event, notwithstanding that they do not fulfil the requirements to be considered as such under the law.

In the absence of statutory provisions and / or contractual arrangements on force majeure, which instruments are available to avoid the performance of contractual obligations?

As discussed above, under Chilean law *force majeure* is contemplated as a general exemption of liability regardless if the parties include a specific clause addressing such in the agreement. Doctrines such as frustration of purpose or impracticability are not generally accepted by Chilean courts.

What else needs to be considered by clients that are party to a contract which is affected by COVID-19?

The discussion about if the sanitary emergency generated by COVID-19 may qualify as a *force majeure* event is just beginning. Such qualification will depend on how the courts construe the relevant requirements of *force majeure* and apply them to concrete disputes arising from breaches or termination of agreements, due to the impact of COVID-19.

Likewise, considering the scale of the emergency, we cannot ignore that some particular regulations may be issued in order to reduce the negative effects that COVID-19 may generate that may affect businesses and agreements, which eventually could lead to a reinterpretation of *force majeure* by the courts.

What restrictions do laws of your jurisdiction place on an employer that wants to require employees to work remotely or from home during the COVID-19 outbreak?

Even though an agreement between the employer and employee is required to implement a teleworking system, it is difficult to imagine that companies without such agreements could be sanctioned by labor authorities if they require employees to work remotely, given the circumstances and the fact that Chilean authorities have made a call for employers to facilitate work from home to prevent the spread of the virus. To formalize a teleworking system under these circumstances, an email addressed to the entire workforce informing them of this temporary measure would suffice.

Employees who are working from home must be paid in the same way that they would if they were working in the office, except in case where employees are entitled to medical leave. If regular medical leave or medical leave due to quarantine is issued, the health insurance institution to which the employee is affiliated or the Mutual Aid Fund institution will pay the employees' remuneration, subject to certain limitations. The actual social security institution that will make the payment will depend on whether the COVID-19 virus transmission is deemed a labor-related disease or a common illness.

In order for a company to be covered by the mandatory work-related accident and diseases insurance, it must provide notice to its affiliated Mutual Aid Fund institution of the fact that its employees are rendering services by telecommuting,

May employers in your jurisdiction require employees to use their vacation time during a COVID-19 outbreak?

No. However, the employer could declare a collective vacation for all employees or for those assigned to a determined establishment for 15 business days. A collective vacation means that an employer may determine that its company or an establishment or section of it will close annually for a minimum of 15 business days so that its relevant employees will collectively make use of their annual right to vacations. In repeated rulings, the Labor Board has understood that the capacity of granting collective vacations is a prerogative of the employer, which can be exercised unilaterally based on the employer's managing powers.

Important considerations:

a) For those employees who are affected by the measure but have not yet earned the right to vacation yet, it is legally understood that vacation is being advanced.

b) Collective vacations should last for at least 15 business days. If the company decides to shut down for longer, the Labor Board has interpreted it so that the additional days may not be attributed to the vacation days the employees would be entitled to in the following year.

c) The Labor Board has understood that the employer may only use this prerogative once a year.

In the current situation, some employees may be able to challenge the decision of the company based on the fact that -in view of the current "state of catastrophe" and the closing of the borders of Chile- employees will not be able to duly enjoy their vacations. However, as employees would continue receiving their entire remuneration and, given the current national situation, there are companies that will have financial issues in implementing this contingency, in our opinion, the labor authorities would likely recognize the protection and benefit this provides to employees.

Are there any restrictions on putting employees on unpaid leave for limited periods of time during the COVID-19 outbreak?

No. However this measure could not be taken unilaterally by the employer. The employees' consent is required and the agreement must be formalized by means of an addendum to the existing employment contract where the terms and conditions of the leave are regulated.

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