

COVID-19: Contract and employment issues in Peru

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This guide highlights key contractual, labor and other considerations that may affect business operations in Peru 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?

Article 2095 of the Peruvian Civil Code provides that contractual obligations originating from an agreement will be governed in principle by the law agreed by the parties thereto. In absence of such agreement, a series of additional rules apply: (i) the applicable law will be the one from the place where the obligation must be complied with; and, (ii) in cases that cannot be determined, the applicable law will be the one from the place of the execution (i.e., signing) of the agreement.

Are there any statutory provisions relating to *force majeure*?

Yes. *Force majeure* means, in accordance with Article 1315 of the Peruvian Civil Code, any circumstances beyond one's control consisting of an extraordinary, unforeseeable and irresistible event, which prevents the fulfillment of the obligation, or results in its partial, late or defective performance.

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

Force majeure clauses are analyzed on a case-by-case basis, and how they are applied will depend on the contractual arrangements in the agreement and the specific events motivating a party to invoke the clause.

Parties to commercial contracts are free to negotiate the terms of their *force majeure* provisions. Courts will apply the provisions of the Peruvian Civil Code to the extent that a commercial contract does not address the issue of *force majeure* or it does so in an incomplete manner.

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

In the absence of a contractual arrangement between the parties, Article 1316 and Article 1317 of the Peruvian Civil Code establish certain rules that would apply. Under the Civil Code, the obligation is extinguished if it cannot be executed because of a circumstance beyond the non-performing party's control. If the circumstance is temporary, the non-performing party is not liable for the late performance of the obligation while the circumstance persists. However, the obligation is extinguished if the circumstance that determines the non-execution persists, until the non-performing party (according to the corresponding agreement or the nature of the obligation) can no longer be considered obligated to execute it, or until the counterparty justifiably loses interest in its performance or such performance is no longer useful for the counterparty. The obligation that can only be partially executed is also extinguished if it is not useful for the counterparty, or if the counterparty does not have interest in its partial execution. Otherwise, the non-performing party is obliged to execute it with a reduction of the consideration, if any. Furthermore, Article 1317 establishes that the non-performing party is not liable for the damages and losses resulting from the non-execution of the obligation, or its partial, late or defective fulfillment, for causes not attributable to the non-performing party, unless the contrary is expressly provided by law or by the relevant agreement.

In order to demonstrate the existence of a *force majeure* event in the absence of a contractual arrangement, the non-performing party must prove that the circumstances that are beyond its control consist of extraordinary, unforeseeable and irresistible events, in accordance with Article 1315 of the Peruvian Civil Code. In practice, Article 1315 may be construed in conjunction with Article 1314 of the Peruvian Civil Code, which establishes that whoever acts with the required ordinary diligence is not liable for the non-execution of the obligation or for its partial, late or defective performance.

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

On March 15, 2020, the government of Peru declared a State of National Emergency and mandatory social isolation was imposed until March 31, 2020, as a result of the COVID-19 pandemic. During the State of National Emergency, the exercise of constitutional rights related to personal freedom and security, the inviolability of homes, and the freedom of assembly, as well as transit across the national territory, are restricted. In accordance to Article 4 of Supreme Decree No. 044-2020-PCM, during the State of National Emergency National and mandatory quarantine, people can only transit across public roads for the provision and access to the following essential services and goods:

- > Acquisition, production and supply of food, including its storage and distribution for its sale to the public;
- > Acquisition, production and supply of pharmaceutical products;

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- > Attendance to health care centers, in cases of emergencies and urgencies;
- > Performance of works that guarantee the continuity of services linked to water, sanitation, electric power, gas, fuel, telecommunications, cleaning, solid waste collection, funeral services, and others;
- > Return to the place of residence;
- > Assistance and care for elderly adults, girls, boys, adolescents, dependents, people with disabilities or people in vulnerable situations;
- > Financial, insurance and pensions entities, as well as complementary and related services that guarantee their proper functioning;
- > Production, storage, transportation, distribution and sale of fuel;
- > Hotels and accommodation centers, only with the purpose of complying with the established quarantine;
- > Media and call centers;
- > Workers in the public sector who exceptionally provide services related to the sanitary emergency related to COVID-19 may transit to their work centers in a restricted way; and
- > Any other activity of an analogous nature to those listed above or that must be carried out by virtue of a fortuitous event or *force majeure*.

By exception, the Ministry of Economy and Finance may also include strictly essential additional activities to those indicated above, which do not affect the State of National Emergency.

Thus, companies need to evaluate on a case-by-case basis whether the limitations above trigger a *force majeure* clause within their specific contracts, as well as other provisions related to material adverse change, material adverse effect or similar clauses.

Finally, the Peruvian borders have been closed.

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?

According to Emergency Decree No. 026-2020, employers have the following obligations in case they decide to require their employees to work remotely or from home during the COVID-19 outbreak:

- > They cannot alter salaries or other economic conditions. This does not apply to benefits that are linked to an employee's attendance (i.e., transportation benefits);
- > They must inform each employee of the health and safety measures and conditions that they should follow while working from home; and

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- > They must inform each employee of their decision to change the location where the services will be rendered through a letter, email or other similar means. Employers should have proof of this (i.e., read receipt).

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

This has not been clarified yet by the regulations that have been issued since the mandatory quarantine period was declared on March 15, 2020. However, government officials have consistently stated that using vacation time is not an option, and that employees that are not able to work from home due to the nature of their tasks should be granted compensable paid leave (they will have to work additional hours once the quarantine period is over). This should be confirmed by a Supreme Decree that should be published soon.

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

None of the regulations that have been issued since March 15 mention unpaid leave as a viable alternative during the quarantine period. As discussed above, government officials have consistently stated that compensable paid leave is the only valid option, and this should soon be confirmed.

Are there any other key considerations for foreign companies operating in your jurisdiction relating to COVID-19?

Foreign companies operating in Peru should also consider the following:

- > There is a closed border policy that prohibits transportation of people. However, imports and exports of products are allowed;
- > Public entities that are not needed in connection to the emergency caused by COVID-19 are not open to the public;
- > Procedural deadlines before the judiciary have been suspended for 15 calendar days; and
- > Administrative procedures before public entities have been suspended until April 29, 2020.



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