

LEGAL ALERT

Law on the contract of employees of digital platforms comes into effect

On September 1st, 2022, Law No. 21,431 that modifies the Labor Code to regulate the contract of employees of companies providing services through digital platforms (hereinafter, the "Law") entered into effect. The Law regulates the services rendered by these employees for users of mobile or fixed device applications managed by said companies.

Scope

The Law is applicable to digital platform services companies (hereinafter, "DPSCs"), consisting of those organizations that manage computer or technological systems executable in mobile or fixed device applications, allowing its employees to perform services for the users of said systems within a specific geographical territory (such as the pick-up or distribution of goods, or minor transportation services of passengers, among others).

The Law allows and regulates the hiring of both dependent employees or independent contractors for the performance of these services, depending on the existence, or not, of a tie of subordination and dependency between the company and the individual, as well as the fulfillment of other requirements established in article 7 of the Labor Code for dependent labor or employment relationships. In the case of independent contractors, the DPSCs can only coordinate the contact between the worker and the users, but they may establish the general terms and conditions that allow the operation through their systems.

Common rules applicable to dependent employees and independent contractors

- **Obligation to inform the service offered:** At the time of offering a service and prior to its acceptance, the DPSCs must inform their employees/independent contractors (hereinafter in this section II both referred to as "workers") about (i) the identity of the user, (ii) the method of payment and (iii) the place of execution of the service (including

the address of delivery or the origin and destination of the transportation, as the case may be).

- **Protection of the worker's data:** The worker's data is reserved and can only be used by the DPSC in the context of the services, but it may be released through a judicial resolution for the purposes requested. Workers may request access to their data, particularly regarding their rating and other information that impacts their performance, which must be delivered within 15 business days in a format that allows computer portability. The DPSC must allow the relevant authorities to access their algorithms, their explanations on the decision-making process, and to the training data and to other relevant factors for audit purposes.
- **Prohibition of discrimination by automated mechanisms:** The algorithms of the DPSCs must respect the principle of equality and adopt measures to avoid discrimination between workers in the assignment of work, their incentives, remunerations and in respect of other matters. The DPSC shall inform the workers about these measures. Any apparently neutral behavior of the DPSC that disproportionately affects one or more workers will be considered discrimination.
- **Training and protection elements:** DPSCs must provide their workers with (i) training in the health and safety criteria defined by the competent authority, (ii) for workers using motorcycles or bicycles, helmet and knee and elbow pads complying with the requirements under applicable regulations. The workers shall return these elements at the end of the services, and (iii) insurance to cover damages to personal property used by the workers in the provision of the service, with a minimum annual coverage of 50 Unidades de Fomento. (USD2,000 aprox.)
- **Calculation basis for termination severances:** The calculation basis for the legal severances that are applicable upon termination will be the average remuneration of the last year worked, excluding the months not worked and taking into consideration the years of service. If the severance for years of service that corresponds by application of article 163 of the Labor Code is higher, the latter will be applied.
- **Collective rights:** Workers shall have the right to establish trade union organizations subject to the law. Unions that affiliate independent contractors may negotiate with the DPSC directly and voluntarily in an “unregulated process” as set out in article 314 of the Labor Code.

****Special rules applicable to dependent employees****

- **Employment contract stipulations:** Notwithstanding the mandatory provisions required under article 10 of the Labor Code, the employment contract of these employees shall also specify: (i) the nature of the services and their

terms and conditions (including the processing of the employee's personal data and the impact of ratings by users); (ii) the method for calculating the remuneration and the form and period of payment; (iii) the designation of an official channel for the employee to submit objections, claims or requests regarding payments, registration and assignment of tasks and the evaluation by the clients. This channel must be attended by a person if the worker so requires, and it shall have with a physical location for attention, a local telephone and an assigned employer's representative; (iv) the geographical area of the services, and if this is left to the employee's free will, the contract must indicate the manner and time in which the employee's choice shall be notified; (v) transparent and objective criteria to establish contact and coordination between the employee and the users. For purposes of establishing the workday in the contract, it may be agreed that the employee will distribute its workday in the manner that best suits its needs (in which case the contract must indicate the obligations of the employee once connected and the advance notice he/she must provide before disconnecting), or else, the employee may be subject to the general rules on workday distribution.

- **Working schedule:** The workday is defined as the time elapsed from the access to the digital infrastructure until the employee's voluntary disconnection. The employees will be exempt from mandatory rest on Sundays and holidays in accordance with the rules of article 38 of the Labor Code. Employees who freely distribute their working schedule will be subject to the ordinary maximum limits for the work week (45 hours) and workday (10 hours), as well as to the weekly rest regulations. The DPSC must implement a reliable mechanism for recording the working schedule in accordance with article 33 of the Labor Code, which must clearly identify between the hours of "passive availability" hours and the actual hours worked.
- **Remuneration:** Employees who freely distribute their working hours may agree on remuneration: (i) per unit of time in accordance with the general rules, or (ii) for the services actually provided (as a percentage of the price charged to users or another objective parameter). In the second case, the payroll slip must contain an addendum with the details of the operations and the method of calculation. In any case, the remuneration per hour actually worked may not be less than the proportion of the minimum monthly income, increased by 20% in order to remunerate waiting hours or other time not actually worked. The DPSC shall pay the difference in the event of failure to reach the minimum remuneration in the respective payment period as set out in the law. The frequency of payment will be as stipulated in the contract, and in the absence of a stipulation, the remuneration will be paid on weekly basis.

Special rules applicable to independent contractors

- Provisions of the services contract: The contract must be written down in clear and simple language and in Spanish, and shall indicate at least the following: (i) the identification of the parties; (ii) the terms and conditions to determine in Chilean pesos the price or rate of the services and other monetary incentives; (iii) transparent and objective criteria to establish contact and coordination between the contractor and the users; (iv) the geographical area of the services or the method for its determination. In the absence of a stipulation, it shall be understood that the matter is left to the free will of the contractor; (v) the contractor's personal data protection rules; (vi) the maximum time of continuous connection and the disconnection obligation by the DPSC; (vii) the designation of an address in the country for purposes of communications and notifications; (viii) the designation of an official channel for objections, claims or requests in the same terms as for dependent employees; (ix) the grounds for termination of the contract, form of communication, terms and mechanisms provided on the platform to complain about the termination; and (x) the general conditions for the provision of the services and other stipulations that are agreed upon. The DPSC will only be able to activate the contractor in its systems once he/she expressly accepts the contract, and any modification must be informed and accepted by the contractor in order to be applicable. The DPSC must deliver a physical or electronic copy of the contract to the contractor, and it must keep another copy available to the parties in the computer system for the contractor to read and download.
- Fees, tax and social security: The DPSC shall pay the fees within the respective payment period, which may not exceed one month, and shall facilitate the registration of the payment information and the necessary operational aspects. The fees for each hour of services actually executed may not be less than the minimum monthly income divided by 180, and increased by 20%, and the DPSC shall pay the difference if the minimum is not reached in the respective payment period. The tax treatment of fees will be that set out in article 42 No. 2 of the Income Tax Law related to the income from liberal professions. The tax withholding obligation applicable to the DPSC that is incorporated, domiciled or resident in Chile will be subject to the provisions of article 74 No. 2 of the Income Tax Law or the corresponding provisions of said Law. The DPSC shall require that the contractor issues the corresponding tax documentation (invoice for the services provided to users or the documentation established by the Internal Revenue Service).

The contractor will have the right to access to social security coverage, by

contributing to said system in accordance with the provisions of article 92 of Decree Law No. 3500 of 1980 of the Ministry of Labor.

- **Disconnection obligation:** The DPSC shall ensure compliance with a minimum disconnection time of the contractor of 12 continuous hours within a 24-hour period. The DPSC may only temporarily disconnect the worker for these purposes and may not carry out temporary disconnections or other disciplinary measures based on facts such as the rejection of a service offered or the non-connection in a certain period.
- **Advance notice of termination:** The DPSC must serve a 30-day advance notice of termination in writing to the contractor who has provided continuous services for 6 months or more, except in the case of behaviors described in the contract that constitute a serious breach by the contractor. The contractor may complain about the termination in accordance with the procedure established in the contract, in addition to other applicable actions.
- **Fundamental rights:** The DPSC must respect the constitutional rights of the contractors. Contractors who have provided actual services during the last 3 months for at least 30 average hours each week, may file a lawsuit, in accordance with the protection procedure regulated in the Labor Code, in case of violation of fundamental rights or anti-union termination.

Sanctions and transitory rules

- **Sanctions:** The Labor Board may audit the compliance with these regulations and may apply the fines referred to in article 506 of the Labor Code (i.e., from 1 to 60 Unidades Tributarias Mensuales (USD66 to 4,000 approx.) depending on the headcount of the DPSC), which may be doubled in case of recidivism.
- **Obligation to comply with the minimum percentage of Chilean employees:** The DPSCs who, at the date of entry into force of the Law, do not comply with the requirement established in article 19 of the Labor Code of having at least 85% of Chilean employees among their personnel, will have three years to reach this ratio, counted from the publication of the Law (which occurred on March 11th, 2022).

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