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MAIN ASPECTS IN RELATION TO THE CHILEAN GOVERNMENT'S MODIFICATIONS TO THE BILL THAT PROMOTES A CHANGE OF THE CONCEPT OF ENTERPRISE FOR LABOR PURPOSES (THE "MULTIRUT LAW")

News Alert Main aspects in relation to the Chilean Government's modifications to the bill that promotes a change of the concept of enterprise for labor purposes (the "Multirut Law")
On April 21, 2014, the Chilean Government sent new modifications on the pending bill that promotes a change of the concept of Enterprise contained in Article 3, paragraph 3, of the Labor Code.

The first indication incorporates an element of uncertainty in relation to what will be the clear and specific criteria that according to the law will have to be taken into consideration in order to determine if two or more companies altogether constitute one economic unity for labor purposes. Indeed, it is proposed a new fourth paragraph in Article 3 of the Labor Code, which states that "Two or more companies will be considered as a single employer for labor and social security purposes, whenever they have a common labor managing, and concur in their respect conditions such as the similarity and the necessary supplementarity of the products they elaborate or the services they render, or the existence among them of a common controller".

In addition to this clear requirement ("common labor management"), there are also other requirements. However, the bill refers to them in a vague context by referring to them only as "such as". Concepts as wide as "having products offered or services rendered that are similar or supplementary", in an economy that works through the constant interaction of several companies whose products or processes "supplement" each other, can lead to misunderstandings and introduce legal uncertainty.

The proposal gives jurisdiction to the Labor Courts for the resolution of these matters. However, this is already contained in the bill. Notably, there is a relevant amendment contained in the proposal. Before the modifications, the bill referred to a report that the judge had to request from an Expert Committee during the process of determining the existence of an economic unit, however, the report was not binding. The current comment eliminates such reference and instead, states that the judge "will decide after having a report issued by the Labor Board". There is no reference as to the value of this report or the value that the judge shall give to it. However, Article 23 of Law Decree N°2 of 1967, from the Labor and Social Security Ministry, which "Establishes the Restructuring and Sets the Functions of the Labor Board", states that:

"The Labor Inspectors will be considered as ministers of faith regarding all actions engaged in the performance of their duties, in which they may take statements under oath.
Thus, the facts uncovered by the Labor Inspectors and from which they should inform in their own initiative or by request, will constitute a legal presumption of truth for all legal purposes, including for the purpose of legal evidence ".

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In consequence, the content of the report according to the current legislation may not be considered only as a mere element of a conviction, but may also be coated with a legal presumption of truth. The companies sued as an economic unit will have to overcome such presumption, most likely having to prove negative facts and consequently relieving the burden of proof for those who claim the economic unit declaration.

The modification proposes to remove Article 507 of the Labor Code in its current wording and replace it with an entirely new text. The new proposal entitles "unions or employees who believe that their labor or social security rights have been affected" to file a claim regarding the declaration of an economic unit.

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Thus, the action cannot be executed for mere declarative purposes. An actual infringement of labor or social security rights must be alleged as a consequence of the division of the companies. However, the bill does not distinguish between special categories of rights, so apparently it will be enough that, for instance, a fragmentation of unions or of collective bargaining processes in the different companies occur as a result of the companies' division. The foregoing may be understood as infringements of rights (as referred to in the message sent by the Government to Congress including the modifications).

If two or more companies are declared as one economic unit for labor purposes, all employees of all of the companies involved may promote collective bargaining processes with all of the companies considered as a single employer; they may also constitute unions including employees of all the companies that are considered as the economic unit or choose rather to maintain the existing unions. The collective bargaining process with intercompany unions that gather only employees from the companies that are part of the economic unit shall cease to be optional for the employer and it will be now governed by the rules of regulated collective bargaining as if it were a company union that chooses this type of negotiation.

The effects of an eventual judgment establishing the economic unit may include:

1. If ordered by court, any pending payment as a result of the economic unit declaration (salaries, profit-sharing, vacations, etc.), will be enforceable to any of the companies of the unit with joint and several liability;

2. The judgment must order specific measures to which the employer (the economic unit) will be forced to be recognized as a sole employer, without giving the law a specific content to this authority. This could certainly constitute a limitation of the employer's right to organize, direct and manage the business, even though the message of the Government states that the bill ensures "autonomy and freedom to employers in order to adopt the business organization that they deem most appropriate";

3 In the event that it is ruled that the alteration in the individuality of the employer was intended to simulate the employment relationships through third parties, or was a subterfuge resulting in the avoidance of compliance of labor and social security obligations, applicable fines could be quadrupled in their minimum range (5 to 20 UTM, US$373 to US$1,493) and tripled in the maximum (100 to 300 UTM, US$7,464 to US$22,393) with respect to the existing fines in the current Article 507 of the Labor Code; and,

4 The bill expressly states an exception to the relative effect of judgments, indicating in second to last paragraph of the proposed wording of article 507 that "the final judgment shall apply to all employees of the companies that are considered to be a single employer for labor and social security purposes". Then it will be sufficient the successful claim of one employee to amend the structure of all companies that could be considered as a single economic unit.