July, 2014

LAW NO. 20,760 WHICH INTRODUCES THE CONCEPT OF SINGLE EMPLOYER IN CONNECTION WITH CERTAIN INTERRELATED BUSINESS

On July 9th, 2014, it was published in the Official Gazette the Law No. 20,760 which introduces the concept of single employer in connection with certain interrelated business, amending articles 3 and 507 of the Labor Code. The main aspects of the amendments included in the law may be summarized as follows:

- The concept of enterprise (empresa) for labor and social security purposes is amended, defining it as any organization of personal, material and immaterial means, organized under the direction of an employer, for the achievement of economic, social, cultural or welfare goals, with a determined legal individuality.

- The current final paragraph of article 3 of the Labor Code, which punished the violations to such article according to article 507 (simulation and subterfuge) is eliminated.

New paragraphs are incorporated to article 3 of the Labor Code, providing the following:

- Two or more enterprises may be considered as a single employer for labor and social security purposes when the following circumstances take place: a) Common labor direction; and b) Other conditions also take place, such as, the fact that the products or services that they develop or render are similar or supplementary, or the existence among them of a common controller.

- The circumstances in letter (b) above are only examples provided by the law of elements that may take place so that, coupled with the element of "common labor direction", two or more enterprises may be declared as a single employer.

- The law clarifies that the mere circumstance of participating in the ownership of the enterprises does not in itself qualify as one of the elements or conditions that lead to having various enterprises considered as a single employer.

- The declaration of "single employer" takes place by judicial ruling issued by the labor courts as explained below, with a previous report issued by the Labor Board and also the judge may request additional reports to other Government authorities.

- The companies that are declared as a single employer shall be jointly and severally liable for the compliance of the labor and social security obligations arising from the law, the individual contracts and collective instruments.

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- The employees of all the companies considered as single employer will be entitled to establish one or more unions, or to maintain their existing unions.

- Likewise, employees of the companies declared as a single employer will be entitled to bargain collectively with all the companies considered as a single employer, or else with each of them.

- Intercompany unions comprised only of employees belonging to companies declared as a single employer, will be entitled to initiate a collective bargaining process, being the employer obligated to negotiate with such unions (up until now collective bargaining with intercompany unions was voluntary for employers).

- The law indicates that the collective bargaining process in this case shall be subject to the rules in Chapter I, Title II, Book IV of the Labor Code, this is, according to the rules of the regulated collective bargaining within the company.

Article 507 of the Labor Code is completely eliminated and replaced by a new one which basically provides the following:

- Establishes the general procedure for judicial actions related to the declaration of a single employer according to the following rules:

    - The holders of the legal action are the unions and employees of the corresponding enterprises that consider that their labor or social security rights have been affected.

    - The action may be presented at any time, except during a regulated collective bargaining process.

    - If the judicial procedure under which the declaration of single employer is being processed exceeds the date of presentation of the project for collective contract, the terms and effects of the collective bargaining process must be suspended while the aforementioned action is pending resolution. Due to the latter, it will be understood that the effectiveness of the collective instrument in force is extended until 30 days after the judicial resolution is firm, day in which the negotiation shall be resumed in the manner determined by the court.

Establishes the contents of the ruling that totally or partially grants the judicial action for declaration of single employer, according to the following:

- It must indicate the enterprises that will be considered as single employer for labor and social security purposes.
- It must indicate the specific measures that the employer must comply with, in order to materialize its' single employer condition.
- It must indicate the measures addressed to the fulfillment of all the labor and social security obligations and to the payment of all due payments. The two aspects above, under the penalty of fines between 50 and 100 UTM (USD$3,834 to USD$7,670 approx.) that may be repeated until full compliance with the ruling.
- It must determine whether the alteration of the employer's individuality is or not due to simulation for the hiring of employees through third parties, or to the use of any subterfuge, hiding, cover-up or alteration of its individualization or assets, and if such action have resulted in the avoidance of legal or contractual labor and social security obligations. If the court determines that there has been simulation or subterfuge in the alteration of the employer's individuality, the ruling must precisely detail (i) the conducts constituting simulation or subterfuge, and (ii) the violated labor and social security rights, and the court must fine the wrongdoer for an amount between 20 and 300 UTM (USD$1,533 to USD$23,000), which may be doubled or tripled depending on whether it is a medium (50 to 199 employees) or large company (200 or more employees).

- The law provides that "subterfuge" includes any malicious alteration performed through the establishment of different company names, the creation of legal identities, the division of the company, and others that imply the diminution or loss by the employees of their individual labor rights (specially profit sharing and severances per years of service) or collective labor rights (specially the right to unionization and collective bargaining). In this sense, the law establishes that for a subterfuge to take place there must not only be an objective element, as the alteration of the individuality of the employer, but also a subjective element, as the malicious intention of the employer at the time of such alteration.

- The law provides that the ruling shall apply and extend to all employees of the enterprises declared as single employer for labor and social security purposes.

The law raises a number of relevant questions and uncertainties. Following is a preliminary list of some of those concerns. This list is naturally non-exhaustive and shall evolve in time through the case law that develops around the new law and the interpretations that the Labor Board may issue in this regard:

- The law orders the court to establish the "measures to which the employer is obligated, addressed to materialize its condition as such single employer": This is an extremely broad concept. A conservative approach, consistent with the spirit of the law suggests to limit such "measures" to those strictly necessary to reestablish labor or social security rights that have been affected, but we will have to wait the first rulings to really know how the courts will effectively use these broad powers.

- Due to the total substitution of the old article 507 of the Labor Code for an entirely new one, we believe that there would be an implied repeal of the concept of subterfuge and simulation for the hiring of employees through third parties for any other scenario different than from the declaration of single employer.

- Once declared by judicial ruling that several companies constitute a single employer, the law does not establish mechanisms to revert this situation in case of subsequent change in the circumstances that led to the ruling. For example, in the case of transfer of one of the enterprises to third parties.

- The law refrains from regulating the value and enforceability that extrajudicial agreements between the parties may have on this matter. For example, an agreement according to which the parties may agree that two or more enterprises are (or have ceased to be) a single employer for labor and social security purposes.

- **Shall the declaration of single employer, or the new definition of enterprise, affect several matters such as the following, and how:**

    - Safety rates/records (tasas de accidentabilidad).
    - Employer obligations based on the number of employees, such as day care, risk prevention departments, hygiene and safety committees, etc.
    - Application of fines established due to the number of employees of the enterprise.
    - Equal remuneration between men and women holding similar positions in each of the different enterprises comprising the single employer.
    - Percentage of foreign employees in the enterprise.