

# CRIMINAL RISKS FOR COMPANIES AND THEIR ADMINISTRATORS IN THE CONTEXT OF COVID-19

*This document intends to offer, from a practical perspective, a general guide of action for companies and their administrators during the state of emergency in relation to the applicable criminal law regulations.*

## 1. Relevant crimes in the context of the public health emergency

### i. White collar crimes: hoarding and speculation

These crimes seek to protect consumers and the market, carrying out penalties from 4 to 9 years in prison and fines from 26 to 300 minimum legal monthly wages.

While the hoarding crime consists of subtracting from the market products officially considered by the competent authority as being of first necessity in amounts greater than 50 minimum legal monthly wages (approx. COP43'890,150 or USD \$ 11,074), the crime of speculation consists in the conduct of a manufacturer, producer or wholesale distributor that puts on sale an article or genre officially considered by the competent authority to be of primary necessity at a price higher than that set by the competent authority.

### ii. Sanitary crimes: violation of a sanitary order

This crime seeks to protect public health and violation involves penalties from 4 to 9 years in prison.

The crime of violation of a sanitary order consists of not complying with a sanitary measure adopted by a competent authority to prevent the introduction or spread of a dangerous and contagious disease in the country.

This class of crime belongs to a special category in which the examination of whether the crime has been committed or not, must be consulted in concordance to other legal provision, such as, in the public health crisis context, measures issued by the public health authority.

### iii. Crimes against the life or health of workers

The crimes of involuntary homicide and involuntary personal injury seek to protect the life and personal integrity of people. These crimes imply prison terms ranging from 1 year to 9 years.

These illegal behaviors consist of killing or injuring others with no compliance of general care duties required to perform certain activities.

### iv. Cybercrimes

These crimes seek to protect computer systems, information and data, whether

the company is the owner or the subject responsible for their treatment.

Within the category of cybercrimes there are several conducts such as abusive access to a computer system (hacking), obstruction of a computer system (denial of services), interception of data (man in the middle), violation of personal data, computer damage, malicious software use, among others. These crimes carry out prison terms between 4 to 8 years.

## 2. Criminal risks for companies and administrators

In the exceptional circumstances in which businesses are being carried out, with great stress to the economy, companies are fundamental actors in maintaining the economic system and will be protagonists in the revival of industries and businesses during and after the emergency.

Therefore, it is necessary to identify the risks related to the crimes outlined, in order to manage and monitor them without neglecting the objective of preserving the economic activity of the company.

For the administrators, this management of risks is very important, since as there is no criminal responsibility in Colombia for legal entities, they are the first to be called to respond to the criminal law, either because they actively intervened in an act considered as a crime, because they omitted to prevent a violation of the law or because by acting on behalf of the company, they sought the benefit of it

at the cost of a criminal offense.

Likewise, it is also necessary to manage the criminal risks that may affect companies as victims, as could happen in cases of cybercrimes.

### i. Risks for economic crimes

With the onset of the emergency, many consumers turned to businesses to stock up on basic products. In addition, many companies took advantage of the unusual consumer behavior to increase product prices. In some cases, prices simply fluctuated in a certain way due to external factors. All of these situations may have criminal relevance, and in some cases may set up criminal liability for the administrators of companies potentially involved in this type of behavior.

The aforementioned criminal provisions are not complete without an administrative regulation, issued through the Resolution 078 of April 7, 2020, by virtue of which 26 products were considered officially as essential and whose prices will be subject to control and monitoring by DANE and the Superintendency of Industry and Commerce.

In this sense, it is from this administrative regulation that the crime was normatively integrated and, consequently, it is possible to assess when the employer is dealing with a product (i) officially considered essential and (ii) whose amount exceeds 50 minimum legal monthly wages (approx. COP43'890,150 or USD \$ 11,074) or the price set by the competent authority.

However, depending on multiple factors, such as the behavior of the market, consumers, the pandemic and the emergency in general, these administrative provisions may change and be modified, with which the crime would also be modified.

Therefore, it is advisable to appoint a team to constantly review official sources and verify the issuing of regulations that may affect the activity of the company and that are relevant to avoid any possible criminal provision.

## **ii. Risks for sanitary crimes**

The competent authorities have enacted various measures in order to prevent the spread of the virus in the population. Thus, among others, measures such as social distancing, the closure of air, land, river and sea borders and the export ban on certain products to prevent internal shortages, among others, were enacted.

All the measures that the authorities take in the context of the sanitary emergency are sanitary measures, so their violation implies the risk of committing a crime. It is important to know what these measures are, because there are exceptions that cover certain activities. It is imperative that administrators do not carry out business activities or compel employees to carry them out if they are not included in the exceptions to the social distancing measure, since this will create a criminal risk of violation of a sanitary measure or, in some cases, even a criminal risk for the crime of constraint.

Therefore, it is advisable to appoint a team to constantly review official sources and verify the issuing of regulations that may affect the activity of the company and that are relevant to avoid any possible criminal provision.

## **iii. Risks for involuntary homicide or involuntary personal injury crimes**

In case of companies that are within the excepted economic sectors and therefore can continue with their business activities, it is important that risks related to the life and health of workers (who must leave their homes and expose themselves to the virus) are managed.

Although companies and their administrators are not criminally responsible for the way the virus behaves or for the self-care measures that its workers implement, they are responsible for acting diligently to provide workers with the necessary security elements to be able to exercise their work in those situations in which their work involves a risk for them; administrators are also responsible for designing work protocols during the pandemic, aimed to avoiding contagion. In the context of the pandemic, these minimum safety elements are those related to self-care, such as face masks, antibacterial gels or gloves, depending on the work being carried out, as well as cleaning and disinfection, distancing and non-agglomeration policies.

Failure by staff to comply with the measures ordered by the company could involve serious offenses and even merit dismissal.

In this sense, there is a risk of criminal liability for employers who do not fulfill their duty to protect the health of their workers; this risk exposes them to criminal liability in the event that measures have not been implemented to protect workers and avoid damages for being exposed to the virus in the course of their work.

Examples for protection measures are: gloves, face masks, glasses, antibacterial gels, workplace disinfection and face-to-face work protocols, among others.

#### **iv. Risks for cybercrimes**

The need for economic activity continuity has resulted in information and communication technologies becoming highly relevant for that purpose. To that extent, many companies have implemented home office techniques, which allow meetings via videoconference or disconcertion of document management from the office to workers' homes.

This situation exposes companies to cybercrimes, to the extent that the terminals of a worker and the internet network they use do not have the customary security measures implemented in facilities and business networks. Such deficiencies could be easily exploited by hackers or crackers to the detriment of the interests of the company.

Therefore, it is essential to adequately protect the company's information during the virtualization of the operation by implementing computer security measures, which must be proportional to the importance of the information that is managed and exchanged. Failure to take such measures may create liability for company managers and the companies themselves.

### **3. Criminal justice system**

On the occasion of the pandemic and the own restrictions of mobility that imply the mandatory social distancing, the Office of the Attorney General of the Nation and the judicial authorities have issued several guidelines for the judicial officers and users.

In the case of the Attorney General's Office, many of the offices are closed and officials are working from home. Others, such as the local prosecutors of the Immediate Reaction Units, are open and executing their tasks.

Regarding the filing of complaints, for years the Office of the Attorney General of the Nation and the National Police have had on their website (<https://adenunciar.policia.gov.co/adenuncia/Login.aspx?ReturnUrl=%20to%20report>) the A Report platform, through which virtual complaints are received for theft, fraud, extortion, forgery, cybercrimes and child sexual exploitation. To report any other crime, you can contact line 122 of the Office of the Attorney General of the Nation, where you can file a complaint verbally. Currently, the Complaints and

Assignment Reception Rooms are closed.

To follow up on a process at the Prosecutor's Office, it is also possible to contact line 122 to verify the status of the procedure.

In relation to the courts, the Superior Council of the Judiciary ordered that, as far as possible, judges implement virtual means to carry out their work. To be able to perform virtual hearings, the logistics must be coordinated with the relevant court, who must process whatever is necessary with the administrative area of the Judicial Branch.

As of April 11, the Superior Council of the Judiciary ordered that:

Requests to legalize arrests, indictments and requests to impose a preventive detention must be performed in person.

- i. Requests for extension, replacement or revocation of preventive detention measure will be made, if possible, by virtual means.
- ii. Requests for liberty due to expiration of terms will be made, if possible, by virtual means.
- iii. Requests for an arrest warrant will be made, if possible, by virtual means.
- iv. The subsequent legality checks will be made, if possible, by virtual means.

v. Requests for release for sentence served, redemption of sentence, probation, house arrest and formalization of confinement will be made, if possible, by virtual means.

vi. The scheduled trial hearings with a detainee will be made, if possible, by virtual means.

vii. The Supreme Court of Justice will continue to hear its matters virtually.

The filing and other communications must be sent and received by email. For this purpose, the offices will communicate the institutional email to be used and the users must communicate the same to the offices.

On the other hand, the Superior Council of the Judiciary ordered the suspension of judicial terms, which began on March 16 and has been extended until April 26, 2020.

For all of the above, it is recommended:

- Communicate to the judicial offices what's the e-mail address that you will use.
- Ask about the institutional email to be used by offices.
- Constantly check your email.
- Check the security filters of your email to avoid receiving a communication that is addressed to the spam folder.

- Prepare to attend virtual hearings, and to have the appropriate technology and communication equipment (terminals and internet) to undertake virtual proceedings.
- Digitize important documents and always send them in PDF version.
- Despite the suspension of terms, move forward in the important work that must be filed as soon as the terms are resumed.
- Follow up on procedures at the Prosecutor's Office through the attention line 122.
- File complaints virtually if possible. If you have doubts about the adequacy of the crime and about whether that particular crime can be reported online, it is better to report it and once the emergency is over, request a formal readjustment.



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