COVID- 19: LIABILITY OF EMPLOYER IN THE FACE OF POSSIBLE CONTAGION

Consider the following general practices for achieving a successful implementation of the measures that must be adopted and adapted in respect of work health and safety during the COVID-19 emergency in order to prevent risks in matters of employer liability

Employers' duty of protection

Pursuant to articles 56 and 57(2) of the Substantive Labor Code, among the main obligations of employers is the care and safety of their workers.

In compliance with this general obligation contained in the Substantive Labor Code, employers are obliged to implement a Workplace Health and Safety Management System ("SG-SST") that seeks to identify the risks to which workers are exposed in order to prevent work accidents or occupational diseases from occurring under pillars of promotion and prevention.

Currently, when there is a high risk of negative health effects because of the spread of the COVID-19 virus, employers' compliance with the duty of care and strict implementation of the SG-SST becomes even more important.

Similarly, it is essential to comply with the protocols for biosafety measures established for the different economic sectors to be able to demonstrate diligence and compliance with the obligation to promote health care / attention.

Although Decree 488, 2020 sets forth that Occupational Risk Administrators (ARL) shall carry out promotion and prevention actions, among them the purchase of personal protection equipment for employees directly exposed to COVID-19, the Ministry of Labor, through Circular 029, 2020, was emphatic in pointing out that the assistance provided by the ARLs does not exempt the employer from supplying personal protection elements and performing occupational health and safety activities; this, in addition to the fact that the assistance referred to in Decree 488, 2020 only concerns employers who carry out activities in which their employees are directly exposed to the risk of contagion of COVID-19.

Consequences of breaching the employers' duty to protect

The Ministry of Labor may initiate administrative sanctioning procedures against employers for non-compliance with the duty to protect and safeguard their workers,

which may result in the imposition of fines of up to 5,000 minimum monthly wages (currently COP$4,389,015,000).

Additionally, noncompliance could result in workers or third parties affected by a worker's medical condition to initiate legal action under the terms of article 216 of the Substantive Labor Code, seeking full compensation for damages caused, as a result of the employer failing to act diligently, prudently and with determination in its obligation of safety and care. These claims for full damages could result in extremely costly court decisions.

Despite the fact that the risk of occurrence of work accidents or occupational diseases is transferred to the ARLs at the time of affiliation and making the respective contribution for the employees, one must bear in mind that the case law has been repetitive in stating that within the General System of Occupational Risks there are two types of liability: (i) strict liability, derived from the employment relationship, obliging ARLs to recognize in favor of the worker the expected financial benefits and provide the corresponding health care and assistance; and (ii) fault-based liability, derived from the negligence or willful misconduct of the employer in respect of the work accident or occupational disease and which imposes on the employer the obligation to fully and comprehensively compensate the damages caused to the worker as a consequence of the occupational hazards suffered.

In addition to full compensation for damages as previously stated, in accordance with article 12 of Decree 1771, 1994, in the event that it is proven that the employer did not act with diligence, prudence and determination in order to protect the employee, the ARL may also claim from the employer responsible for the professional contingency, the amounts of the financial benefits and assistance provided by such Administrator.

Similarly, negligently breaching the duty of employers to protect and safeguard the life and health of employees can have criminal consequences. In fact, if the causal link between negligent breach of duty and the resulting event classified as a crime (death or personal injury) can be demonstrated, employers (especially administrators in the event that the employer is a legal entity) may be exposed to the penalties for wrongful death or wrongful personal injury, ranging from 1 to 15 years in prison and a fine of 6 to 150 monthly minimum wages (currently approx. COP $ 5,266,818 - COP $ 131,670,450).

Origin of contagion of COVID-19

Among the occupational diseases listed in the annex to Decree 1477, 2014, COVID-19 is not included. However, through article 13 of Decree 538, 2020, the Ministry of Health determined that

COVID-19 will be included in the table of occupational diseases, as a direct occupational disease only with respect to workers in the health sector, including administrative, cleaning, surveillance and support staff who provide their services as part of activities of prevention, diagnosis and care of this disease.

It is important to highlight that within the table of occupational diseases set forth in Decree 1477, 2014, although a column of occupations or industries that are typically affected by each occupational disease is included, an express note is included indicating that the list of occupations and industries is not exhaustive, implying that there may be additional occupations or industries affected by a certain occupational disease.

Therefore, despite the fact that, at the moment, COVID-19 is only presumed to be an occupational disease for health sector personnel who have permanent exposure to the virus, in the event that a worker manages to prove that it got infected as a result of exposure to risk factors inherent to his or her work activity or to the environment in which the worker has been forced to work, this disease will be declared as of work origin.

It should be noted that with respect to workers exposed to COVID-19 in the workplace, if an event leads to contagion, such event should be reported as a work accident to the ARL in order to take the necessary preventive measures, as the event or accident can lead to an occupational disease – a COVID-19 infection. The foregoing means that, despite being reported as an accident at work, a COVID-19 infection ultimately results in an occupational disease.

The foregoing also means that, as an occupational disease, all health care and assistance and financial benefits must be covered by the ARL (strict liability) and the applicable financial benefits will be calculated in accordance with the rules on occupational diseases, which are different from those of work accidents.

Now, as mentioned, if the worker or his/her heirs succeed in proving that the COVID-19 virus contagion occurred as a consequence of the employer's breach of its obligation of care and safety pursuant to article 216 of the Labor Code, they may initiate a claim for full compensation of damages.

Administrative aspects to consider

To avoid the risks mentioned, it is essential that employers reinforce the implementation of and compliance with the SG-SST and strictly comply with the biosecurity protocols established by the Ministry of Health in Resolution 666, 2020, as well as the protocols and regulations issued for each specific sector.

Please note that in accordance with Resolution 666, 2020, the obligation to have a work environment in adequate hygiene and safety conditions applies not only in respect of direct employees, but also extends to individuals who as contractors provide their services at the company's facilities.

Additionally, we advise preparing and preserving for the future, supporting documentation and evidence of the execution and implementation of biosafety protocols to prevent the spread of COVID-19 in the workplace.

Finally, it is important to adopt and enforce control mechanisms in order to verify compliance with the security protocols implemented and in the event of non-compliance with said measures, take immediate administrative actions such as, but not limited to, warnings, reprimands, sanctions, termination of the employment relationship, etc.

Mitigation of liability of employer due to employee's noncompliance

If the employee does not use the personal protection elements provided by the employer or does not comply with the provisions of Resolution 666, 2020 and other protocols issued for each sector, in spite of the employer providing and maintaining adequate hygiene and safety conditions in the workplace, such behavior will constitute a breach of article 58(7) of the Labor Code, in turn constituting just cause for the termination of the employment contract, in accordance with the provisions of articles 62(a)6 and 62(a)12 of the aforementioned Code.

We recommend leaving a written record of all disciplinary measures including warnings given to employees for breaching hygiene and safety protocols, that serve as evidence in a possible judicial proceeding in order to establish that the damage was caused by the victim's own fault despite the employer having implemented the required protocols.

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