

TOP TEN CONSIDERATIONS THAT HAVE BEEN AFFECTED BY COVID – 19 IN PERUVIAN INDUSTRIES

Due to the outbreak of Covid-19 around the globe that has affected public health, many countries, including Peru, have adopted social isolation measures in order to mitigate further spread of the virus, restricting the movement of people in the communities to what is essential.

As per established by Supreme Decree 044-2020-PCM, Peruvian government declared state of national emergency for an initial period of fifteen (15) days from March 16th, 2020, and further extended until April 26th 2020. These regulations, provides for: a) a mandatory social isolation, b) restriction on the exercise of constitutional rights relating to personal freedom and security, the inviolability of homes, and the freedom of assembly, c) transit across the national territory, d) closure of borders and e) suspension of activities of employees of public and private sector. However, it guarantees the supply of food, medicine, as well as the continuity of the services linked to water, sanitation, electric power, gas, fuel, telecommunications, cleaning, solid waste collection, funeral services, and others essentials activities.

The aforementioned government measures have caused the disruption of many economic activities jeopardizing their business continuity, turning impossible for those economic agents to face their duties whether in labor, tax and/or contractual aspects as we explain in this article.

1. HOME OFFICE

As a consequence of the Mandatory Social Isolation (Quarantine), the Government of Peru issued the Emergency Decree N° 026-2020 and the Supreme Decree N° 010-2020 to avoid the spread of COVID-19 in the workplace or during the transfer of workers to it.

These standards establish that private companies must implement home office, understood as that provision of services subordinated to the physical presence of the worker in their home or place of home isolation, using any means or mechanism that makes it possible to carry out work outside the workplace whenever the nature of the work allows it. In addition to these, it is specified that the fact of carrying out remote work does not change or modify the ordinary working day agreed with the employer before starting the remote work modality or the one that would have been reconvened on the occasion of the same. However, in no case may it exceed the ordinary workday or workday established by law, that is, it could not exceed eight (8) hours per day or forty-eight (48) hours per week.

2. LICENCE WITH PAY AND WORK COMPENSATION

By Emergency Decree N° 029-2020 it is established that employers who do not carry out the activities indicated in numerals 4.1¹ of article 4, 8.3² of article 8 and 9.3³ of article 9 of Supreme Decree N° 044-2020-PCM, and always that home office does not apply, they must grant license with pay and work compensation for the duration of the declaration of emergency. Likewise, this regulation indicates that this leave with enjoyment must be compensated by the worker with later working hours, unless the parties agree otherwise. In other words, it imposes on the worker the obligation to return the hours paid on the license with work in hours after the National Emergency State.

This, in order to ensure the employment and payment of remuneration of those workers who, due to the nature of their work, cannot carry out the same via remote work, and thus avoid mass dismissals or that the employer adopts any decision damaging to labor rights of workers during the state of emergency.

3. EXTRAORDINARY WITHDRAWAL OF THE PRIVATE PENSION FUND AND FREE DISPOSITION OF TIME SERVICE COMPENSATION (CTS) UP TO THE SUM OF S/2,400.00⁴

In order to minimize the economic impact of the Mandatory Social Isolation by COVID-19, the Government issued Emergency Decree N°034-2020 by which it allow affiliates of the Private Pension Fund Administration System (SPP) to withdraw from extraordinary amount of its pension fund the sum of up to S/2,000.00, provided that until March, 31st of this year, no mandatory pension contributions have been made for at least six (06) consecutive months. For this purpose, members of the SPP who meet the aforementioned requirement can submit their request to their Private Pension Fund

¹ Pursuant to paragraph 4.1 of article 4 of Supreme Decree N°044-2020-PCM, during the validity of the State of National Emergency and quarantine, people can only circulate through public use roads for the provision and access to the following services and essential goods:

- a) Acquisition, production and supply of food, which includes its storage and distribution for sale to the public.
- b) Acquisition, production and supply of pharmaceutical and basic necessity products.
- c) Assistance to health centers, services and establishments, as well as diagnostic centers, in cases of emergencies and urgencies.
- d) Employment, professional or business provision to guarantee the services listed in article 2.
- e) Return to the place of habitual residence.
- f) Assistance and care for older adults, girls, boys, adolescents, dependents, people with disabilities or people in vulnerable situations.
- g) Financial institutions, insurance and pensions, as well as complementary and related services that guarantee its proper functioning.
- h) Production, storage, transportation, distribution and sale of fuel.
- i) Hotels and accommodation centers, only for the purpose of complying with the established quarantine.
- j) Means of communication and call centers.
- k) Workers in the public sector who exceptionally provide necessary services to attend to actions related to the health emergency caused by COVID-19 may move to their work centers in a restricted manner.
- l) By exception, in the cases of productive and industrial sectors, the Ministry of Economy and Finance, in coordination with the competent sector, may include additional activities strictly indispensable to those indicated in the preceding paragraphs, that do not affect the national state of emergency. .
- m) Any other activity of an analogous nature to those listed in the preceding paragraphs or that must be carried out by fortuitous event or force majeure.

² International transportation of cargo and merchandise.

³ National transportation of cargo and merchandise.

⁴ Actual Exchange Rate: 1 US\$ = S/ 3.37

Administrator (AFP), remotely or by using the channels established by each AFP. Likewise, in the event that the worker's pension fund has an amount less than S/2,000.00, the AFP must make the full account available to the affiliate in April.

On the other hand, the Government issued the Emergency Decree N° 033-2020, which allows workers during the national emergency term period to freely dispose of the funds of the intangible amount for CTS deposits up to the sum of S/2,400.00 that will be paid, at the worker's sole request, which can even be presented through non-contact channels.

4. TO GIVE SUBSIDY TO THE EMPLOYER OF 35% OF THE MONTHLY GROSS REMUNERATION OF THOSE WORKERS WHO RECEIVE UP TO S/1,500.00

Likewise, in order to preserve the jobs of private sector workers, through the aforementioned Emergency Decree No. 033-2020, the Government provides that the employer will receive a subsidy of thirty-five percent (35%) of the gross monthly remuneration of workers who have a salary not higher than S/1,500.00 that are registered in the Electronic Payrolls (PLAME) as of January 2020 and whose working period in the T-Register does not indicate an end date or is not earlier than March 15th, 2020.

For this purpose, the Tax Administration Authority (SUNAT) is required to process the Monthly Return (PLAME) for January 2020 in order to determine the employers and the amounts that the employer will receive as subsidy. In order to qualify for this subsidy, the employer must meet the following conditions: i) have complied with the Essalud declaration corresponding to the month of January 2020, ii) have not been dropped from registration in the Single Taxpayer Registry (RUC) and, iii) not to be as there has been.

Finally, it establishes that the payment of the subsidy will be delivered accrediting the bank account of the employer, for which the latter must inform the Interbanking Account Code (CCI) remotely and in a timely manner to SUNAT.

5. EXTENSION OF DEADLINES FOR THE COMPLIANCE OF TAX OBLIGATIONS

Considering that the restriction of activities other than those of basic necessity and the obligatory social isolation have generated that many companies have freeze their activities, the government has provided for extensions for the fulfillment of tax duties, based on the gross income of the companies.

Thus, it has been arranged for those taxpayers who have gross income for the 2019 fiscal year lower than S/ 21'000,000.00, that the Annual Declaration of Income Tax for the 2019 Fiscal Year that originally had to be filed in between March and April 2020, now be filed in June 2020. A similar measure has been taken for the tax obligations for the months of March and April 2020, those now be filed in the month of June and July 2020, with some exceptions.

With this measure, the liquidity that could have been destined to the payment of said taxes obligations is now used by the taxpayers in the payment of other concepts. This

measure also allows companies to take better advantage of those tax expenses that are linked to the Annual Declaration of Income Tax for its use, such as tax expenses for payment to non-domiciled, and others.

6. LIBERATION OF TAX DETRACTION ACCOUNT

Another of the measures adopted by the Government is release, in an exceptional period, the funds accumulated until March, 15th 2020 in the detraction account (account that, in principle, is exclusively for the payment of tax obligations), in order that companies may have more liquidity to satisfy other obligations different from taxes.

7. MEASURES TO BE TAKEN IN THE APPLICATION OF THE MOST IMPORTANT TAXES IN THE COUNTRY

Due to the global context in which we find and in view of the possibility of an economic recession, the Government has planned to take measures at tax level in order to lessen such impact.

Thus, a tax reform is being planned. For the Income Tax, the aim is to optimize the application of tax expenses for donations, the tax losses system, and other improvements; and for the General Sales Tax, to extend the early recovery of the GST for the acquisition of capital goods.

8. COVID-19 MAY TRIGGER HARDSHIP, INDEMNITY AND FORCE MAJEURE CLAUSES IN CONTRACTS DURING THE STATE OF NATIONAL EMERGENCY

As we said, government measures to minimize further spread of Covid-19 have caused the disruption of many economic activities jeopardizing their business continuity and, in many cases, turning impossible for those economic agents to face their obligations. What contractual alternatives do those economic agents have to face under such scenarios?

According to Peruvian Civil Code a force majeure event means any unpredictable, extraordinary and irresistible event beyond the reasonable prediction and control of a party without the parties' fault, that prevents, hinders or delays on the performance of its obligations. In case of occurrence, the contract may be temporarily suspended or even terminate without liability of the party affected by the force majeure event. However, in many cases, parties in a contract establishes their own force majeure clause determining the definition of force majeure event, its effects as well as procedures and formalities to enforce said clause.

Likewise, Peruvian Civil Code establishes that if the performance of an obligation under a contract becomes excessively burdensome because of any unpredictable and extraordinary event, party affected by such event shall have the right to claim for an adjustment of the consideration. However, in many cases, parties in a contract

establishes their own hardship clause determining the definition of excessively burdensome, its effects as well as procedures and formalities to enforce said clause.

The difference between those two concepts in the Peruvian Civil Code is that in hardship, the performance of the disadvantaged party becomes much more burdensome but not impossible, while in a force majeure event the performance of the disadvantaged party becomes impossible, at least temporarily. In any case, these hardship or force majeure clause shall be carefully interpreted in order to enforce it.

On the other hand, Peruvian Civil Code also establishes good faith in contract law, therefore, good faith shall govern the negotiation, celebration and execution of a contract. By this concept, it could be easier and less expensive for both parties to renegotiate and agree on an alternative solution rather than submitting said dispute to the judicial or arbitration forum for its solution.

Finally, subject to case by case basis analysis, in many cases, the declared state of national emergency represents a force majeure event or, in other cases, could represent a cause that turns the performance of an obligation much more burdensome, with the corresponding effect, as the case may be. Notwithstanding the abovementioned, the context represents a scenario to modify the contractual terms subject to good faith.

9. ENTERING INTO CONTRACTS DURING THE STATE OF NATIONAL EMERGENCY

As per established in Peruvian Civil Code, contracts are binding and enforceable between parties as long as they reach agreement unless a special formality is required by law subject nullity sanction.

Likewise, Peruvian Civil Code stated that the agreement shall be declared verbally, electronically or by physically signing. Furthermore, the mentioned code establishes that documents cannot be dismissed purely on the grounds that they are electronic; however, in case of conflict arising out of electronic documents, parties may have to provide additional supporting documents before judicial court or arbitrator in order to assure that its full content is unaltered.

On the other hand, by Law N° 27269⁵ published in 2000 and its regulations, Peruvian legislation recognizes legal validity of digital signature without any additional supporting document further than the digital certificate and its expedition through the corresponding software provided by companies duly authorized before INDECOPI.

The recent context is encouraging companies to move toward the digital environment as it represents an increasing need for business continuity.

10. COVID-19 IMPACTS ON SHAREHOLDER'S MEETINGS AND MEETINGS OF BOARD OF DIRECTORS

As mentioned before, the state of national emergency declared in order to minimize further spread of the virus in Peru, also restricted the exercise of constitutional rights relating to personal freedom and security, including the freedom of assembly which directly affects the functioning of the corporate bodies of Peruvian companies. Therefore, there is a need for organizations to implement alternative ways of organizing their meetings to build business continuity.

According to General Corporation Law, bylaws may provide the following alternatives:

- For the holding of absentee meetings, through written, electronic, or other communication means that enable and ensure the authenticity of the agreement.

However, in case of meetings of board of directors, any director may object to the exercise of this procedure and require the completion of a face-to-face session. Likewise, a shareholders' meeting is mandatory when called for by shareholders representing twenty percent of the outstanding shares entitled to vote.

- Shareholders or partners may, for the purposes of determining a quorum and for the respective voting and adoption of resolutions, exercise the right to vote by electronic means provided that the count with digital signature or by postal means to that end is required to have notarial signatures.

The formation of a universal board or assembly⁶ (without notice), as well as the social will formed through electronic or postal vote has the same effects as a meeting or assembly held in-person.

- Any shareholder with right to participate in general meetings can have someone else represent him/her, representation that must be recorded in writing and especially for each general meeting, except if it goes along with powers granted by a public deed and registered before the company at least twenty-four hours ahead of the time established for holding the general meeting. Likewise, bylaws may authorize the representation of directors.
- Exceptionally, when the circumstances do not allow recording the minutes of the general meetings in the company's ledger, they shall be recorded in a special document and signed by all the attending shareholders. This document shall be attached or transcribed to the book or to the loose sheets as soon as they are available, or in any other way permitted by law.

Particularly, if the company's bylaws does not provides for the holding of absentee meetings or despite that provision by objection of shareholders representing twenty percent of the outstanding shares entitled to vote or a director, as the case may be, general meetings or meetings of boards of directors duly called to be held during the period of social isolation are automatically cancelled and the board of directors or, as the

⁶ Article 120 of the General Corporation Law.

case may be, the company management shall call for a new session, as per the requirement stated in bylaws.

CONCLUSION

- The Government of Peru has adopted a series of labor measures, among them we have: implementation of remote work, leave with the benefit of being compensable, extraordinary withdrawal up to the sum of S/2,000.00 from the private pension fund, retirement or free provision of the amount of S/2,400.00 from the Compensation Fund for Time of Services, however, we warn that these measures have favored only the formal private sector workers who are registered in the contracted company remuneration sheets, since either as fixed-term or indefinite-term workers, since it is these workers who hold all the social benefits provided by law and are protected by Social Security in health and pensions.

It is important to mention that in Peru the majority of companies are informal or are micro and small companies that border on informality in which the majority of the working population works, however, to date no labor measures have been issued, financial or economic resources to help informal sector workers, independent professionals, small and medium entrepreneurs or micro and small entrepreneurs to face the negative economic impact or economic crisis caused by the Covid-19 pandemic crisis.

We consider that there is still pending regulations to support labor, financial and economic matters that allows companies in the informal sector, as well as micro and small companies to better face the economic crisis and allow the employment permanency of those millions of Peruvians who do not have adequate labor protection or Social Security.

- On the other hand, in tax aspects, we concluded that the Peruvian Government is taking measures to reduce the impact of Covid-19 on the economy. For this reason, greater economic provision is being granted to taxpayers with the extension of tax obligations and with the extraordinary release of funds from the detraction account, also plans are being made to improve the application of the most important taxes in the country, such as Income Tax and General Sales Tax. However, the measures mentioned above are not enough, since the national emergency restrictions is creating a cease of various economic activities causing a liquidity drawback to the majority of companies in the country.
- In contractual aspects, we concluded that, the recent context is encouraging companies to move towards the digital environment, since it represents a growing need for business continuity, even more so if the Peruvian Civil Code establishes that the will agreement will be declared verbally, electronically or by physical signature. Furthermore, the Civil Code also establishes that documents cannot be discarded for the simple fact of being electronic; however, we mention that due to a matter of evidence before a judicial or arbitral tribunal, additional supporting documents will have to be provided in order to ensure that the entire content is not altered.

Additionally, our legal system today recognizes the legal validity of the digital signature without any additional supporting document beyond the digital certificate and the issuance through the corresponding software provided by companies duly authorized before INDECOPI.

- Finally, in commercial issues the organizations have alternatives that the General Corporation Law offers them, as we mentioned in point 10. however, we must bear in mind that in case the statutes do not provide for the holding of shareholder´s meetings and meetings of board of directors in the absence or despite this provision, due to the objection of the shareholders who represent twenty percent (20%) of the outstanding shares with voting rights or one (01) director, as the case may be, shareholder´s meetings and meetings of board of directors duly called to be held during the period of social isolation they are automatically canceled and the board of directors or, where appropriate, the company's management will call a new session, according to the requirements established in the statutes.

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