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ABOGADOS

TELEWORKING: AMENDMENT TO ARTICLE 311 OF THE FEDERAL LABOR LAW

Since 2019, the Congress has been working in the amendment to the legal framework applicable to teleworking and/or work from distance. On December 8, 2020, the Legislative Chamber discussed and approved the draft of amendment to article 311 of the Federal Labor Law (“FLL”) and the addition of Chapter XII BIS that will regulate the figure of “Teleworking”, which was referred to the Senate on December 9, 2020, and the latter, in such date, approved in general and particular terms to regulate with greater detail this figure.

The integration of “home office” in 2012 was incorrect and incomplete. By a technical mistake, teleworking was equated to home office. As of the new legislation that will be in force, the distinction between these concepts is that home office is such work carried out at the domicile of the employee, without being under control and direction of employer. By comparison, for teleworking, as established in the new legal definition, is indispensable that the services comply with the following conditions:

- (i) That the works are rendered in a different place to the workplace of the employer.
- (ii) That it is not required nor indispensable the physical presence of the employee in the facilities of the employer; and
- (iii) That the resources of the new information technologies are used for the administration of the labor relationship and the supervision of the performance of the service.

(iv) Before the legal amendment that will be in force, we identify at least three relevant forms of work with regard to the rendering of services under the scheme of Home Office or work from distance. These forms of services are rendered by means of information technologies and have been established in general under the labor rights and obligations of the FLL, in agreements whereby the parties set forth the terms and conditions of the service.

Firstly, the employees that for convenience and efficiency have the employer’s authorization to work, in an extraordinary manner, one or two days remotely, performing their services by technological means, but, in view of the nature of their functions, have the obligation to render their services in the employers’ facilities.

In second place, we can identify those employees that in view of the nature of their functions may render their services within or out the facilities, indistinctly, and that have the professional liberty to determine if they perform their duties physically or not in the employer's facilities.

Finally, those employees that render their services in their domicile or in a place freely chosen by them, using the information technologies, will be subject to the new legal framework, that include the following conditions:

- Those who, in addition to complying with the three requisites, render their services constantly and fulfill more than 40% of their work shift under such modality will be considered teleworkers. Those who work sporadically or occasionally from a different place to the employer's facilities will not be considered as teleworkers.
- As special regime of work, an agreement must be entered into by and between the employer and the teleworker, in which the obligations, rights and responsibilities of a labor relationship under such modality are established, including the equality in the treatment to teleworkers and employees. Among others, it shall contain:
 1. Description of the equipment and work supplies;
 2. Contact and supervision mechanisms between the parties;
 3. The work-shift, connection and disconnection periods;
 4. The compliance of the obligations and responsibilities of the employer and teleworker in matters of health, security and welfare of professional risks.
 5. The manner in which the modality of teleworking may be revoked pursuant to the existent labor relationship.
- The collective bargaining agreements and the internal work regulations must include the terms and conditions of teleworking, providing a communication system for the link and contact of the employees.
- The employers will be obligated to provide the supplies, equipment and pay the proportional costs of the connectivity and electric energy services. The ruling expressly refers to the computer equipment, ergonomic chairs and printers, among others.
- Regarding the controversial concept of security in work, the amendment foresees the creation of a Mexican official standard in health, security and welfare of professional risks matters, for the activities to develop outside the workplace using information and communication technologies within a term of 18 months. In the same manner, the amendment establishes that the authorities shall integrate the national network of counsel, promotion and development of teleworking referred in the draft of amendment, as well as to establish the guidelines related to accidents and diseases with teleworking.

In general terms we anticipate that the amendment will contribute to the legal security of the labor relationships that are performed under this modality, in view that it will allow the companies to assure the efficiency and quality of the services rendered from distance, allowing the elaboration of agreements, either of telework or in a flexible modality in which the employee and the employer may agree that, from time to time, and without exceeding the 40% limit, may be rendered the services from distance. In accordance to the special obligations and rights, we estimate that it may be included to the agreements additional conditions in connection to:

- The obligation to perform the services using as a tool a laptop assigned by the company;
- The obligation of the employee to take care and maintain the assigned equipment for the performance of the entrusted activities (hardware as well as software);
- That, as requisite for the employee to work from distance, it shall be complied with all the obligations, works, activities and projects that must be carried out physically in the work facilities or places;

In general terms we anticipate that the amendment will contribute to the legal security of the labor relationships that are performed under this modality

- Limits to the work-shifts, availability of schedule, supervision, digital connectivity and disconnection;
- That the company conserve the authority to determine the activities, date of deliverables, works, projects and tasks to carry out by the employee, indicating the necessary requisites and specifications;
- That the modality of work from distance or home office may be modified, suspended or canceled, from time to time, at any moment that the company considers necessary, provided that the employee's rights are not affected;
- Protection of personal data and privacy of the employee;
- Use and confidentiality of the company's information.

For the purposes of measurement of potential impact in the operation of the companies, we shall analyze, those who rendered or not its services in the workplace at the moment of the emergency health declaration.

It is important to consider that due to the pandemic of Covid-19, on March 27, 2020, the legislative decree stating extraordinary measures to fight the virus was published in the Official Gazette of the Federation, in which it was authorized to the entities and agencies of the Federal Public Administration, to coordinate themselves implementing the mitigation and disease control measures. In compliance with the decree of the Employment and Social Welfare Ministry, on April 24 and May 29 of 2020, published the guide of action for the workplaces before the Covid-19 and, the guide to implement telework in the workplaces within the context of the actions to face Covid-19,

respectively, which triggered the implementation of this figure as a measure to mitigate the spread of the virus.

Agreeing to the rendering of services from home pursuant to the referred agreements and recommendations of labor authorities, does not imply from our perspective, the recognition that the services are not necessary in the facilities of the company, and does not transform the employees by definition in teleworkers for the simple circumstance that until today they fulfill their tasks from home, in view that, once concluded the health emergency, the employees shall provide their services in the work place as they have done until before the emergency, since their appearance in the employer's facilities results indispensable, as it is agreed.

For such purpose, it is important to review the terms and conditions of the labor agreements of home office that were implemented, to verify that the cause of modification to the labor relationship has its causality in the health emergency, and that the company has full authority to terminate the agreement in order for the employee to attend to its work in the domicile where he had once attended.

It is relevant to refer that this amendment will be in force during the health emergency by the Covid-19. The amendment was sent to the Federal Executive Branch for its enactment and publication in the Official Gazette of the Federation and come into force as of the following day as foreseen in the transitory articles, which we estimate will be in the following days.