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Editorial

In 2008, the price of the barrel of oil reached record levels, which led many countries, both oil producers and non-producers, to rethink their energy policies. One of the approaches the developed countries are considering as an alternative to dependency on hydrocarbons is the promotion and development of alternate sources of energy. The search for and study of alternate energy sources has resulted in the need for domestic and international regulations. Mexico is no exception: the Ministry of Energy (SENER) and the Ministry of Agriculture, Livestock, Rural Development, Fisheries, and Food (SAGARPA) have set to establishing guidelines and regulations in order to promote the use of biofuels.

Thus, the Inter-Ministerial Commission for the Development of Biofuels was created. Among the principal members of the commission are representatives of SENER and SAGARPA. The objectives of the commission include the search for programs to promote the use of alternative biofuels, which will decrease the environmental impact of the massive use of fossil fuels.

Internationally, the demand for and consumption of grains and other natural products—whether used in the generation of biofuels or in the feeding of people or livestock—has caused a disequilibrium in the food supply. This in turn generated internal inflation in several countries, an occurrence that worried governments, as well as central banks, who seek to control inflation rates.

It is important to mention the new international policies intended to control climate change, which we also shall address in this issue of the *Newsletter*. These measures have been taken not only locally, but also internationally. For this purpose the Kyoto Protocol was signed by numerous countries, including Mexico. The Kyoto Protocol creates mechanisms for the most polluting countries to reduce their emissions of greenhouse gases. It is important to mention the support that can be granted to companies or institutions who wish to receive benefits, including economic ones, for the implementation of projects that reduce emissions of greenhouse gasses.

In this newsletter we also address, as in previous issues, other topics that we consider will be of interest to our readers, such as compliance with resolutions validly adopted by the shareholder meetings, the requirements for hiring personnel, certain practical problems in the application of the Transparency Law, and others that we hope you will find helpful.

Claus von Wobeser

Commercial Bankruptcy with Restructuring Plan

On December 27, 2007, the decree amending provisions of the Commercial Bankruptcy Law (*Ley de Concursos Mercantiles*, LCM) was published in the *Official Federal Gazette.*

This decree mentions the addition to the LCM of Title XIV and of a new concept, commercial bankruptcy with a restructuring plan, which offers a series of benefits to the merchant who finds himself in a current or imminent state of insolvency. The purpose of Title XIV is to allow the merchant to preserve his business as an economic entity by the signing of a plan that can serve as a reasonable security base for reaching a settlement with his creditors and thereby avoiding commercial bankruptcy.

The merchant who is in a state of insolvency and wishes to opt for this benefit must file a written request to an appropriate district judge requesting that the merchant be declared in commercial bankruptcy and attaching a credit restructuring plan that identifies creditors who represent at least 40 percent of the merchant's total debts. The merchant must declare under oath that he is currently insolvent or will be imminently (within the following thirty days, according to the LCM). It is not necessary to prove the percentage of the merchant's debts that the creditors signing the restructuring plan represent; this percentage will be verified during the credit recognition stage.

One of the advantages that the merchant has in recoursing to commercial bankruptcy with a restructuring plan is that the decision declaring him in commercial bankruptcy is issued immediately, without requiring the involvement of an expert inspector to prove the insolvency of the merchant. Such involvement would be necessary in order to carry out a normal or ordinary commercial bankruptcy proceeding. The credit recognition stage, which determines the ranking of creditors and their priority in collecting, can thereby be initiated.

Another advantage to a restructuring plan is that it can serve as the basis for the settlement that the merchant and his creditors may arrive at in the conciliation stage established in the LCM. Given that the merchant will thus already have the agreement of the creditors who hold at least 40 percent of his total debts, the merchant would have a good chance of reaching the 50 percent required by the law to avoid the declaration of bankruptcy, which would result in the sale of his assets in order to be able to pay his creditors. •

Article 200 of the General Law of Merchantile Companies

The Text of the Article

> Resolutions legally adopted at shareholder meetings are binding, even on those absent or dissenting, except for the right of opposition pursuant to the terms of this law.

Comments

This article concerns the relationship between the resolutions of shareholder meetings and three categories of shareholders: (1) those absent who did not attend the meetings; (2) those who attended the meetings but voted against one or more of the resolutions adopted, and (3) those who abstained from voting. For all these shareholders, the resolutions adopted by the meetings are binding. This means that they must comply with them and cannot act against them as partners or as shareholders, as these resolutions emanate from the supreme body of the company, which can agree to and ratify all the acts and operations of the company. The shareholders are part of the company and are obligated to comply with the resolutions of shareholder meetings.

But this obligation is subject to the condition that the resolutions adopted by the meetings are valid, since this is what is meant by the phrase: "Resolutions *legally* adopted by the shareholder meetings [...]".

Therefore, in addition to the observance of the provisions of the bylaws of a company, the validity or legality of its shareholder meetings depends on the observance of several articles of the General Law of Merchantile Companies (*Ley General de Sociedades Mercantiles*, LGSM), among which should be mentioned: (1) Article 179, which discusses the location of the meetings; (2) Articles 183 and 184, which describe who should call the meetings; (3) Articles 186 and 187, which describe how and when the notification of the meetings should be published and what the notification should contain; and (4) Articles 189, 190, and 191, which refer to the quorum and the adoption of resolutions.

Article 200 arises from the natural assumption that the attendees to the annual meeting—both those agreeing with the resolutions adopted by the meeting and those dissenting—have knowledge of the resolutions and of their binding nature. However, this is not the case for absent shareholders. While they are obligated to be informed, it would be very advisable, and even obligatory, that the administrative body inform all the shareholders—both those absent and those present—of the contents of the resolutions of the meeting and their binding nature.

The final part of the article states the exception of "the right of opposition pursuant to the terms of this law." This exception, given its position and drafting, appears to refer to a personal right of opposition held by absent or dissenting shareholders. This would not be exact because, according to Article 201, the right of opposition is granted to those absent and dissenting, and should also include the shareholders who abstained from voting, provided they represent at least 33 percent of the capital stock.

For the protection of shareholders who do not represent 33 percent of the capital stock, the law does not provide for a corporate action against a resolution illegally adopted by a general shareholder meeting. If such a resolution causes harm to these shareholders, they will have to turn to the competent local or federal courts.

The final part of this article provides an exception to its binding nature for the right of opposition in terms of the same law. But if the authors of this law had wanted to be more explicit, they would have referred to the following articles of the law: 201, 202, 203, 204, and 205. It should be mentioned that the opposition procedure is not presented in the law in a natural or a logical order.

Notwithstanding the text of Article 200, which seems to confer in general the right of opposition to

Border Measures against Counterfeiting and Piracy

all attendees and dissenters, Article 201 only confers this right of opposition to groups of shareholders representing at least 33 percent of the capital stock. But how the group of shareholders is formed is not established until Article 205. Article 201 provides what can be opposed and sets the time period for exercising this right, Article 202 refers to the possibility of suspending the execution of the resolutions, and Article 203 to the effects of the judgment.

Notwithstanding the lack of order we have noted, we believe that the numerical order of the Articles we have been following in our comments should not be changed. •

Without question, border measures serve to prevent and discourage the counterfeiting of trademarks and piracy. However, currently in Mexico such measures are not as effective as they could be. Under the terms of Articles 144 Section XXVIII, 148 and 149 of the Customs Law, border measures are conditioned on compliance with various requirements that hinder their implementation and weaken the framework of potential protection of the holders of registered trademarks in Mexico.

According to the above-mentioned legal provisions, suspension of the free circulation of merchandise from abroad or its detention by customs authorities **can only occur if there is a prior ruling allowing it by the appropriate administrative or judicial authority**. This means that in Mexico, in order to be able to seize merchandise at the time of its entry into the country, there must be a *prior* ruling that, in the case of trademarks, is issued by the Mexican Industrial Property Institute (*Instituto Mexicano de la Propiedad Industrial*, IMPI) or a judge.

If the IMPI issues the ruling, it must hear and rule on a request for temporary measures (which are provided for in the Industrial Property Law (*Ley de la Propiedad Industrial*, LPI) in relation to proceedings for an administrative declaration of violation of any of the rights it covers). However, although the LPI establishes the possibility of imposing such temporary measures (including an order to withdraw from circulation or seize merchandise), the imposition of such measures requires compliance with various requirements.

Briefly, in order to request such temporary measures, the petitioner must meet the following requirements:

1. Prove that he holds an industrial property right (in this case, a registered trademark) that is being or is about to be violated, and prove that he may either suffer irreparable harm or has a legitimate fear that evidence regarding the violation could be destroyed, hidden, or altered;

2. Grant a bond covering the damages and losses that could be caused to the person against whom the measure is being taken;
3. Provide all necessary information for the identification of the merchandise with respect to which the measure is requested (and, in particular, in the case of border measures, provide the name of the importer, a detailed description of the merchandise, the name of the customhouse through which the merchandise will enter, an estimate of the time when it will enter, etc.);
4. Inform the public that the trademark for which the temporary measures have been requested is registered (whether through use of labels as referred to in Article 131 of the LPI or through other means, like print announcements in the press, that provide the public with this information).

This is in addition to the petitioner's continuing with the administrative infringement proceeding within the time periods established in the LPI.

Based on the above, it is easy to conclude that in the adoption of border measures, the legal framework and the actions that are provided for present various difficulties (not to mention that it is the petitioner who must be aware of any irregular entry of merchandise into the country).

In response to reforms in several neighboring countries, both the General Customs Administration and the IMPI have initiated the implementation of a program with the principal objective of creating a database to assist the authorities in fighting the importation of pirated material.

The creation of a catalog of trademarks to which the customs authorities have easy access will allow them to be familiar with (1) the companies that are holders of trademarks, (2) the persons who are authorized to import their products into Mexico (licensees), and (3) their lawyers. This will facilitate the giving of immediate notice when irregularities are detected in the importation of merchandise, which translates into a true customs preventive mechanism that is not conditioned on a complaint by the holder of the trademark and that provides the holder better protection in regard to possible irregular activities.

The proper functioning of this program requires not only the exchange of information and the specialization of the customs authorities in their duties reviewing merchandise (in order to be able to detect irregularities). It also requires several amendments to the Customs Law and the LPI, in order to allow the authorities to act without formal petition. In spite of all these difficulties, we can conclude that concrete actions are being taken to provide holders of registered trademarks with broader protection of their rights.

We will keep you informed regarding the development of this program and any legislation relating to it. •

Comments on the Law to Promote and Develop Biofuels

In February of 2008 the new Law to Promote and Develop Biofuels (*Ley de Promoción y Desarrollo de Bioenergéticos*, LPDB) was published in the *Official Federal Gazette.* One of its principal objectives is the promotion and development of biofuels that will contribute to energy diversification and sustainable development as forms of support for the Mexican rural areas.

Biofuels are understood to be fuels obtained from biomass and that come from organic matter as biproducts of agricultural, livestock, and forestry activities; aquaculture, algae culture, and fish waste; domestic, commercial, and industrial activities; micro-organisms, enzymes, and their derivatives; and that are produced by sustainable technologies. The law also provides that inputs should be understood as the materials used in the production of biofuels and obtained from agricultural and forestry activities.

Under the general provisions of the Law, the basis were established (1) to promote and develop the production of biofuel inputs without putting at risk either the security of the food supply or national sovereignty; (2) to reactivate the rural sector, generate jobs, and offer a better quality of life to the rural population; and (3) to reduce emissions of greenhouse gases.

With these goals in mind, the Inter-Ministerial Commission on Biofuels was created. Among its primary objectives are (1) to oversee the programs set forth in the LPDB and (2) to monitor the actions of federal, state, and municipal governments, as well as the public and private sectors, in fulfilling their responsibilities under the new law.

The LPDB also seeks to support scientific and technological research on the production and use of biofuels, which support will be provided through the Ministry of Agriculture, Livestock, Rural Development, Fisheries, and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación*, SAGARPA) and the Ministry of Energy (*Secretaría de Energía*, SENER). The Law is also supported by the National System for Research and Technology Transfer for Sustainable Rural Development (*Sistema Nacional de Investigación y Transferencia Tecnológica para el Desarrollo Rural Sustentable*), which was created under the Sustainable Rural Development Law (*Ley de Desarrollo Rural Sustentable*). This is the agency responsible for coordinating and guiding scientific and technological research concerning inputs.

Necessary actions are planned to be taken to promote sustainable development of the production and sale of inputs, as well as the production, transportation, distribution, sale, and efficient use of biofuels. Those actions will be defined in the appropriate programs created by the agencies.

Budget support will be channeled to the projects with which the input producers are associated. The Federal Government will give incentives for production from inputs. Incentives will be available to contributors to the development of the biofuel industry and the modernization of its infrastructure.

SENER and SAGARPA should support technological and scientific research- and capacity-building in the production and use of biofuels in order to establish the evaluation procedures necessary to determine the viability of the biofuel production projects.

The Federal Executive Branch, through its agencies and entities, will have the authority to enter into agreements with the public or private sector in order to promote scientific and technological research and capacity-building of the biofuel sector.

The Law establishes the following, among others, as infractions: (1) engaging in activities or providing services without having the required permit; (2) violating the terms and conditions established in the permit; and (3) violating any official Mexican standard applicable to biofuels.

Finally, it should be mentioned that in the case of disputes regarding input productive chain transactions; quality, quantity, and product opportunity; fi-

nancial or technical services; and equipment, technology or production goods, such disputes shall be resolved through the National Arbitration Service (*Servicio Nacional de Arbitraje*). Disputes arising from storage, transportation, distribution and sale, among other activities, shall be presented to SENER. •

Carbon Credits

In an effort to slow global warming, on December 11, 1997, the Kyoto Protocol was signed as part of the United Nations Framework Convention on Climate Change. The Protocol entered into force on February 16, 2005. Under the Protocol, the industrialized nations listed in Annex 1 of the document (with the exception of the United States) agreed to reduce by an average of 5.2 percent their greenhouse gas emissions between the years 2008 and 2012.

The Protocol established three mechanisms for creating a carbon market. The first two—Joint Implementation and Emissions Trading—require the involvement of two developed nations to be implemented. The third, the Clean Development Mechanism (CDM), requires the involvement of a developing nation not listed in Annex 1 (such as Mexico) and a developed nation with reduction commitments.

The purpose of the CDM is to assist parties not included in Annex 1 in achieving sustainable development and in contributing to the ultimate objective of the Convention, as well as to help Annex 1 Parties in meeting their quantified emissions limitation and reduction commitments, contracted under Article 3. In this regard, Article 12, Number 3, of the Protocol establishes the following:

3. Under the Clean Development Mechanism:
   - Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and
   - Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

Thus, the CDM can serve as an opportunity to investment in Mexico, through the carrying out of projects

that prevent or reduce the emission of greenhouse gases and projects that capture carbon. The Protocol identifies greenhouse gases as carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_20), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF_6). Any project chosen must result in reductions in the emission of greenhouse gases in addition to any reductions that would have occurred without the project.

In order to be able to participate in CDM projects, Mexico created the Mexican Committee for Emissions Reduction and Carbon Capture Projects (*Comité Mexicano para Proyectos de Reducción de Emisiones y Captura de Gases de Efecto Invernadero)* within the Inter-Ministerial Commission on Climate Change (*Comisión Intersecretarial de Cambio Climático*), which is the national designated authority for purposes of the Convention and the Kyoto Protocol.

The following categories are authorized for the development of CDM projects:

- Energy industries (renewable / nonrenewable);
- Energy distribution;
- Energy demand;
- Manufacturing industries;
- Chemical industries;
- Construction;
- Transportation;
- Mines / mineral production;
- Metallurgic production;
- Fugitive fuel emissions (solids, petroleum, and natural gas);
- Fugitive emissions from the production and consumption of halocarbons and sulphur hexafluoride;
- Use of solvents;
- Waste disposal and handling;
- Forestation and reforestation;
- Agriculture.

The following are examples of the types of projects that have been developed in Mexico as of February 27, 2008: 143 projects for handling pig and cow waste, 14 regarding methane from sanitary landfills, 8 regarding wind energy, 11 involving cogeneration and energy efficiency, and 5 hydroelectric projects.

The emissions reductions achieved by a project are measured in CO_2 tons, which are translated into Certified Emission Reductions (CERS). The CERS are a form of carbon credits and can be sold in international markets, to public or private companies of industrialized nations, at an approximate commercial value of between 4 and 14 dollars per unit.

To be able to obtain carbon credits, it is necessary to: (1) obtain a letter of approval by presenting the proposed project to the Inter-Ministerial Commission on Climate Change, (2) validate or register the project with the designated operational entities, and (3) present a validation report on the project to the Kyoto Protocol Executive Board. This board will then grant the CER.

Once the CER is obtained it can be sold through an agreement with private companies or public institutions of a developed nation that is a signatory to the Protocol, or it can even be sold in the market at the market rate.

If the sale is made through a contract, the United Nations will open a bank account, in the name of the seller, where the amount corresponding to the CER will be deposited.

It is important to mention that the above-described procedure has an approximate cost of USD 50,000.00 beyond the project cost and that it must be completed within one year, counting from the presentation of the project to the Intersecretarial Commission on Climate Change to the obtaining of the CER.

From a tax point of view, the income from the CER is considered an asset for the acquiring company, and therefore it generates an obligation to pay income tax in accordance with the Income Tax Law. On the other hand, the CERS are considered an economic incentive for private companies to contribute to improving the environment. •

New Regulations on Subcontracting

On April 22, 2008, the Chamber of Deputies of the Mexican Congress approved a draft decree amending Articles 5 A, 15 A, 75, 304 A, and 304 B of the Social Security Law (*Ley del Seguro Social*, LSS), in order to regulate subcontracting or employment intermediation (outsourcing) and to guarantee the social security of workers, regardless of whether the employer acknowledges or denies the employment relationship.

1. What is the Principal Objective of the Reform?

The principal objective of the reform is to make employers and/or companies that benefit from work or services (hereinafter, "the beneficiaries of services"), and who are attempting to elude their responsibilities as employers, liable or jointly liable for such responsibilities.

For this purpose, the reform of the LSS establishes the imposition of several obligations on both beneficiaries of services and employers. These obligations allow the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*, IMSS) to have registration and control mechanisms that facilitate taking timely actions against the beneficiaries of services, as jointly and severally liable, for fulfilling the omissions of the services or outsourcing companies with which they have service contracts when the latter do not comply with their social security obligations regarding their workers.

2. How is Article 5 A of the LSS Amended?

The reform was made to Section VIII of this article. Its purpose is to extend its application to beneficiaries of services so that the IMSS can file claims against them, based on the simple fact that they have workers assigned from services companies or outsourcing companies for the provision of the services contracted with these companies, when these services or outsourcing companies do not comply with their social security obligations in relation to their employees.

Below we present the part of the article related to the proposed reform, which is indicated in bold for greater clarity:

> Article 5 A. For purposes of this Law, the following terms have the meaning indicated:
>
> VIII. Person(s) subject to this law: those indicated in Articles 12, 13, 229, 230, 241 and 250 A of the Law, when they have the obligation to withhold the worker-employer Social Security contributions or to pay them, **and the others established in this law [here is where the companies benefiting from the services are included].**

3. How is Article 15 A of the LSS amended?

The proposed reform of Article 15 A of the LSS establishes that beneficiaries of services will be jointly and severally liable for compliance with the obligations set forth in the LSS when the services companies or outsourcing companies breach such obligations. The beneficiaries of services are also established as persons subject to the LSS according to the definition set forth in Article 5 A of the LSS and, as a consequence, the following obligations are imposed on them:

1. To inform IMSS on a monthly basis, in the terms indicated in the respective regulation, within the first five business days of the month, with respect to the prior month, of the following:
   - The tax domicile of the employer (services or outsourcing company) of the workers that execute the work or provide the services;
   - The complete name, federal taxpayer registry number, social security number, and number of days worked in the month to which the information refers, of the workers that provide the contracted services;

2. To provide the information and the documents requested by IMSS pertaining the contracted services;
3. To allow visits or inspections ordered by IMSS in order to verify compliance with their obligations.

With respect to the services or outsourcing companies as employers of the workers that execute the work or services for the beneficiaries of services, this article also establishes the obligation to inform IMSS, on a monthly basis and within the first five business days of the month with respect to the prior month, of the following:

Of the person benefiting from the service:

- The name or business name;
- The federal taxpayer registry number;
- The IMSS employer registry number; and
- The tax domicile and the location of the work place where the work or services are performed.

Of the workers that execute the work:

- Their name; and
- Their social security number.

In addition, the services or outsourcing companies must issue each month to the workers that execute the work or provide the services (1) the record indicating the name of the person benefiting from them, (2) the location of the work place in which the work or services are performed, (3) the number of days worked, and (4) the base salary reported to IMSS.

It is important to note that with respect to the joint obligation of the beneficiaries of services, this article establishes that such joint liability *may* be determined by IMSS **in case of a breach of the company (the services or outsourcing company) that employs the workers that execute the work or provide the services of any of its obligations established in the lss.**

In this situation, if the employer (the services or outsourcing company) fails to pay totally or partially the worker-employee contributions owed to the workers that executed the works or provided the services to the jointly liable company, IMSS, in addition to demanding that the employer comply with its obligations, will determine and establish the specific amount of the contributions the latter has not paid and will notify the jointly liable company (the beneficiary of the services) of the respective payment amount decreed.

If the employer (the services or outsourcing company) complies with its obligations to IMSS, the beneficiary of the services will no longer be considered jointly liable.

4. How is Article 75 of the LSS amended?

The reform of Article 75 of the LSS establishes that the services or outsourcing companies will be classified according to the most risky activity that their workers engage in, as established in the respective regulation.

This is clearly harmful to the services or outsourcing companies since this will have an impact on the determination of their degree of labor risk premium and will increase the payment of their fees to IMSS.

5. How are Articles 304 A and 304 B of the LSS amended?

Article 304A establishes the infractions of the LSS and its regulations resulting from the acts or omissions of the employers or other persons subject to the law, including as part of the reform the addition of two sections that are related to the proposed amendments to Article 15 A of the LSS, as indicated below:

> Article 304 A. The following acts or omissions of the employer or the persons subject to this Law are infractions of this Law:
>
> **XXII. Not to provide IMSS the information indicated in Article 15 A of the LSS;**
>
> **XXIII. Not to deliver to the workers the record referred to in Article 15 A of the LSS.**

With respect to Article 304 B of the LSS, which establishes the sanctions for the infractions set forth in Article 304 A of the LSS, section IV was also amended to include the new infractions in Sections XXII and XXIII of Article 304 A of the LSS, as follows:

> Article 304 B. The infractions indicated in the above article will be sanctioned considering the seriousness, particular conditions of the infringer, and, as applicable, the recidivism, in the following manner:
>
> IV. Those set forth in Sections I, II, XII, XIV, XVII, XX, XXI, XXII, and XXIII, with a fine equivalent to the amount of 20 to 350 times the daily minimum wage in force in the Federal District.

From the above it can be seen that if the services or outsourcing companies or the beneficiaries of services of these companies fail to provide to the IMSS the information to which we have referred in relation to the reform of Article 15 of the LSS, such companies may be subject to the fine referred to in Section IV of Article 304 B of the LSS.

6. Conclusion

If this reform is approved by the Senate of the Republic, the following is recommended:

1. That the companies that contract services or outsourcing companies carefully evaluate the economic viability of the latter and that they are up to date in their legal, labor, and social security obligations. They should constantly verify the records in which the services or outsourcing companies evidence compliance with these obligations. If they are not in compliance, the beneficiaries of services could be considered by the IMSS to be jointly liable for the failures of the services or outsourcing company to comply with its obligations;
2. That both the services or outsourcing companies and the beneficiaries of their services comply with the obligations imposed on them by Article 15A of the LSS in order to avoid the imposition of fines by the IMSS;
3. That in the event that the company benefiting from the services of a services or outsourcing company has knowledge of any breach of social security obligations by the latter, it demand that the services or outsourcing company comply immediately with this obligation. If it does not, IMSS can determine that the beneficiary of services is jointly liable, and therefore the beneficiary of services will have to pay the unpaid contributions determined by the IMSS, which could be very costly. •

Minimum Requirements for Personnel Hiring

It is of great importance to know the minimum fundamental requirements for the hiring of personnel, whether Mexican or foreign. This implies knowing what documents should be signed at the time of hiring; what processes should be undertaken; and in general what considerations need to be taken into account by a company in hiring an employee, regardless of the position the employee will have and the employee's nationality.

The most relevant points to consider in regard to personnel hiring are explained below.

LAWS THAT GOVERN THE HIRING OF EMPLOYEES

a. *Article 123 of the Political Constitution of the United Mexican States*. This article examines the minimum rights and protections that should be granted to workers who work in Mexico.
b. *The Federal Labor Law*. This law regulates the constitutional rule that specifies the minimum rights that should be granted to workers in Mexico.
c. *Social Security Law*. This law guarantees the right to health care and medical assistance and grants retirement benefits and pensions to workers who retire from the active workforce.
d. *The National Housing Fund for Workers Law*. This law regulates the housing of workers.

It is important to note that the Political Constitution of the United Mexican States and the Federal Labor Law establish that the rights of workers are inalienable and that if any provision goes against these rights, such a provision will be null and void.

HIRING REQUIREMENTS

First the fundamental requirements for the hiring of Mexican employees will be explained.

1. MEXICAN EMPLOYEES

In order to hire Mexican nationals, the following requirements must be met:

- Filling out an employment application;
- The execution of an individual employment contract;
- Registry at the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS);
- Enrollment in the National Workers Housing Fund Institute (*Instituto del Fondo Nacional de la Vivienda para los Trabajadores*, INFONAVIT);
- Enrollment in the Retirement Savings System (*Sistema de Ahorro para el Retiro*, SAR).

A description of each of these requirements follows.

1.1. Filling out an employment application

An employment application should be completed in the format used by the company. Said application should at least include the employee's identification information.

1.2. The execution of an individual employment contract

The individual employment contract is the appropriate document for employers to execute with their employees, which should record the terms and conditions under which the employees are hired. The contract should be signed on the date on which the employee begins work.

1.2.1. Contracts

The Federal Labor Law (*Ley Federal del Trabajo*, LFT) establishes that employment can be contracted for a particular job, for a specified time period or for an unspecified time period.

Thus, individual employment contracts can be one of three types:

- Individual employment contract for a particular work;

- Individual employment contract for a specified time period;
- Individual employment contract for an unspecified time period.

A temporary contract can only be executed (for a particular work or for a specified time period) when the work by its nature demands it and when the company has information to prove that it will indeed be of temporary duration. Otherwise, the contract will be understood to be for an unspecified time period.

The individual employment contract for an unspecified time period constitutes the general rule, it being the only one of the three types of individual employment contracts that fully complies with the principle of stability in employment, a governing principle of labor law.

In general terms, the LFT establishes the minimal information that an employment contract of any type should contain:

a. Name, nationality, age, gender, marital status, employee's domicile, and employer's domicile;
b. If the employment is for a particular work, whether it is for a specified time or an unspecified time period. If it is temporary, its temporary status must be justified in the individual employment contract; the reason for its temporary nature must be established with all due precision;
c. The service or services that are to be performed, which should be determined with as much precision as possible;
d. The place or places where the work will be performed;
e. The length of the work day;
f. The method of payment and the salary;
g. The day and place of the payment of salary;
h. An indication that the employee will be trained and instructed;
i. Other conditions of employment, such as days off, vacation, and any others that the employee and employer agree to.

These are the essential conditions of any individual employment contract. However, in practice, it is highly recommended to establish and detail all the benefits to be granted to workers for services rendered.

1.2.2. Minimum rights of employees

The minimum rights of employees as established in the LFT are:

a. A maximum work schedule of 48 hours a week;
b. One paid day off for every six days of work;
c. An annual holiday bonus of 15 days of salary;
d. An annual paid vacation period of six days after the first year of employment; this period will increase for each year of employment;
e. A vacation bonus of 25 percent of the vacation days to which the worker is entitled;
f. A distribution to the workers of 10 percent of the annual profits generated by the company in the fiscal year, which should be distributed according to the terms of the LFT and the Income Tax Law.

Finally, it is important to note that a lack of a written contract does not deprive the employee of the rights attaching to his employment.

1.3. Registry at IMSS

First, the company has to register before the IMSS as an employer. Upon doing so, IMSS will provide the company with an Employer Registration number.

The Social Security Law (*Ley del Seguro Social*, LSS) requires employers to enroll their employees in IMSS, and to inform IMSS of hires, dismissals and salary changes within a term no greater than five business days.

Likewise, the LSS requires companies to determine their employer-employee quotas and to pay those amounts to IMSS.

Once the company is registered with IMSS, it will need to register the personnel upon hiring them. The employees must pay their corresponding portion of the quota.

With the objective of preventing employers from evading their responsibility, the LSS grants employees the right to request enrollment in IMSS and to inform IMSS of the salary changes and other working conditions, if the employer fails to do so.

Furthermore, if the employer fails to fulfill its obligations to enroll its employees in IMSS and to pay the employer-employee quotas, IMSS may impose sanctions on the employer for failure to fulfill its obligations.

1.4. Enrollment in the INFONAVIT

The company must register with INFONAVIT and, subsequently, enroll its employees in said Institute and

inform the agency of hires, dismissals and salary changes within a term no greater than five business days.

If the company fails to fulfill its obligations, the INFONAVIT Law grants employees the right to provide the corresponding reports to the INFONAVIT, without releasing the employer from its obligation or exempting it from the sanctions it may have incurred.

The employers should determine the contributions that must be made bimonthly to the INFONAVIT for deposit in the employees' housing account.

These contributions, which should be five percent of the base salary, are considered to be social welfare expenses of the companies and are part of the employees' assets.

In an effort to simplify and unify administrative procedures, once companies are registered in IMSS and INFONAVIT, all the operations done with IMSS–such as hires, dismissals and salary changes–are automatically registered in INFONAVIT. This simplifies the administrative burden of the companies.

1.5. Enrollment in the SAR

Once the company has registered with IMSS and has enrolled the employee in said Institute, every time that a payment is made to IMSS, an automatic payment will be deposited in the retirement account of the employee for the corresponding amount.

These contributions, which should be two percent of the base salary, are considered to be social welfare expenses of the companies and are part of the employees' assets.

These contributions are paid bimonthly.

2. FOREIGN EMPLOYEES

In the case of hiring employees of a foreign nationality, companies must comply with the same requirements and procedures as with the Mexican national employee.

However, the foreigners, according to the General Immigration Law (*Ley General de Población*), will be required to have a work visa from the National Immigration Institute (*Instituto Nacional de Migración* INM), which authority, assuming the requirements are met, will issue a visa that allows the foreigner to lawfully work in Mexico.

The INM visa that the foreigner should request is known as the FM3 or, in some cases, the FM2.

Through said visas, the INM authorizes the foreigner to work in Mexico in a particular company.

To obtain an FM3 or FM2, the employer must, among other things, issue a letter indicating that the foreigner will work in the company in a specific position or job and with a specific salary.

Likewise, if for any reason the employment were to be terminated between the foreigner and the company, the company would need to issue a letter to the INM indicating that on a particular date the foreigner ceased working for the company. •

Problems in the Application of the Transparency and Access to Public Government Information Law

The Federal Institute for Access to Public Information (*Instituto Federal de Acceso a la Información Pública*, IFAI) is a decentralized branch of the Federal Public Administration, not divided into sectors, that enjoys budgetary, operative, and management independence.

The Institute has three primary functions:

1. To guarantee the right of private parties to access to public government information;
2. To protect personal information regarding private parties that is in federal government hands;
3. To resolve denials of access to information by agencies or entities of the federal government.

It is the third of the above functions that is of interest here.

When a private party, following the guidelines established in the Transparency and Access to Public Government Information Law (*Ley de Transparencia y Acceso a la Información Pública Gubernamental*, LTAIPG), requests from an agency of the Federal Public Administration information that is classified as public, the agency must provide it. However, frequently an agency refuses to provide the information requested, and, depending on the case, presents arguments to support its position. One of the principal arguments made is that the requested information is categorized as confidential by the LTAIPG. It should be mentioned that the LTAIPG itself provides the mechanism for the petitioner to challenge a public agency refusing to provide certain information:

> **Article 49.** The petitioner who has been informed by a ruling of a committee of a denial of access to information or the nonexistence of requested documents can file himself or through his representative a **writ of review** before the Institute or before the liaison office that has heard the matter within fifteen business days from the date of notification […].

This article specifies that the proper mechanism for challenging the refusal of a public agency to provide information requested by a private party is the writ of review, which can be filed with the IFAI or with any liaison office that has heard the matter. The writ will be ruled on in both cases by the IFAI itself.

The IFAI will rule on the writ of review filed by a private party and will have the following options:

- To reject or dismiss the review;
- To confirm the decision; or
- To revoke or amend the decision and to order the agency or entity to give the private party access to the requested information.

Recently, problems have arisen obstructing the purpose of the LTAIPG. The agencies obligated to provide information have begun to challenge the rulings obliging them to provide such information under Article 2 *in fine* of the Federal Administrative Court Procedures Law (*Ley Federal de Procedimiento Contencioso Administrativo*, LFPCA). This article establishes the following:

> **Article 2.** […] The authorities of the Federal Public Administration will have a right of action to contest an administrative ruling favorable to a private party when it is considered to be contrary to law.

This provision of the LFPCA appears to openly contradict Article 59 of the LTAIPG:

> **Article 59.** The rulings of the Institute will be definitive for all agencies and entities. Private parties may challenge them before the Federal Judicial Courts.

This article is a special provision that supersedes Article 2 of the LFPCA. In this regard, it is clear that Article 2 recognizes the right of action of agencies of the public administration. However, such right is restricted when applying the LTAIPG. To interpret the

law otherwise would necessarily delay without any justification the enforcement of the writs of review, above all if we consider that the attitude of the agencies has been primarily focused on obtaining the suspension of their obligation during the administrative court proceeding that they initiate to challenge the rulings that obligate them to provide information.

As a result of the above, it is hoped that a criterion is soon established by the Federal Tax and Administrative Court rejecting any action of this type by the authorities, in order to prevent not only the processing of a clearly invalid proceeding, but also to prevent a private party from being affected by suspensions that only seek to obstruct the transparency sought by the LTAIPG. •

General Tobacco Control Law

The General Tobacco Control Law (*Ley General para el Control del Tabaco*, LGCT) was published in the *Official Federal Gazette* on May 30, 2008. This law supersedes certain provisions of the General Health Law and regulates the following areas:

- The sanitary control of tobacco products and their importation;
- Protection of the public from exposure to tobacco smoke.

The law in question is federal and considered public policy, which means that it is binding on the entire country and that its provisions cannot be waived. Below we briefly explain the most relevant points of the new tobacco law.

The purpose of the LGCT can be summarized in the following points:

- To protect the health of smokers and non-smokers (called passive smokers) and to discourage the consumption of tobacco, given its harmful effects;
- To regulate the packaging, advertising, and sale of tobacco.

We will address the following issues:

- The sale of tobacco;
- The protection of health;
- Application of the LGCT.

The Sale of Tobacco

These regulations are directed at those who produce and distribute tobacco products.

Producers must have a sanitary license and also comply with the following:

1. Not employ minors in the production process;
2. Attach to each pack labels that explain the harmful effects of the consumption of tobacco. Labels must be clear and visible and occupy at least 30 percent of the front of the pack, 100 percent of the back and 100 percent of the sides. Expres-

sions such as "low tar content", "light", "smooth," etc. are prohibited. In addition, if the product is going to be sold within Mexico, all the information on the pack must be in Spanish and contain the declaration: "*Para venta exclusiva en México*" (exclusively for sale in Mexico);
3. All sales promotions that encourage the purchase of tobacco products (distributing free gifts of the product, distributing logos of the product, etc.) are prohibited.

Distributors are required to comply with the following:
1. To maintain inside their establishments a sign indicating that it is prohibited to sell tobacco to minors;
2. To require that all purchasers of tobacco-derived products prove they are adults;
3. Not to sell cigarettes individually or in packages that contain less than 14 or more than 25 cigarettes, and not to sell tobacco products in vending machines or by telephone, internet, or any other means of communication.

The Protection of Health

It is prohibited for any person to light or to use any tobacco product in spaces designated as 100 percent smoke-free (these being understood as areas "[…] physically closed with public access, or every interior work place and all forms of public transportation—where for reasons of public policy and social welfare it is prohibited to smoke, consume, or have lighted any tobacco product"). Tobacco is also prohibited in public and private schools through high school.

In places with public access or in interior areas of public or private places of work, including universities and higher education institutions, there should be smoking areas, which according to the regulations must be located in open-air spaces, or be located in isolated interior spaces that have mechanisms to prevent the transfer of particulates to the spaces designated 100 percent smoke free. These must be spaces that non-smokers do not pass through.

The Application of the LGCT

The application of this law will be the responsibility of the Ministry of Health, which is the entity before which citizens can present their complaints. A toll-free telephone number will be established by the Ministry of Health.

Any violation of the LGCT will give rise to administrative sanctions that may consist of a warning, a fine, temporary or definitive closure of the business, or arrest for up to 36 hours.

The LGCT entered into force 90 days after its publication in the *Official Federal Gazette*. •

Decree Reforming Articles 168 and 170 of the Regulation of Health Products

On August 5, 2008 a decree reforming articles 168 and 170 of the Regulation of Health Products was published in the Official Federal Gazette.

This reform is extremely important for the pharmaceutical industry because it gradually eliminates the plant requirement. Before this reform, any laboratory that wanted to obtain a sanitary registration for a medication had to have a sanitary license as a laboratory or manufacturer of medications.

According to the new article 168 of the Regulation of Health Products, for a foreign laboratory to obtain a sanitary registration for a medication it is required that: (1) it have a license, certificate or document issued by the competent authority of the country of origin that proves that the company has a permit to manufacture medications in that country; and (2) it have a legal representative with domicile in Mexico.

The new drafting of article 168 and article 170 of the Regulation of Health Products as of the date the reform enters into force will be the following:

> **Article 168.** To hold a sanitary registration of a medication it is required to have a sanitary license as manufacturer or laboratory of medications or biological products for human use. For the case of foreign manufacturers, it is required to have a license, certificate or document that proves that the company has a permit to manufacture medications issued by the competent authority of the country of origin.
>
> **Article 170.** To obtain the sanitary registration of allopathic medications of foreign manufacture, in addition to complying with the provision of article 167 of this Regulation, the following documents must be attached to the request:
>
> I. The certificate of free sale issued by the sanitary authority of the country of origin;
>
> II. The certificate indicating that the company has a permit to manufacture medications and a record of good manufacturing practices issued by the corresponding authority of the country of origin, and
>
> III. The letter of representation, when the laboratory that manufactures it abroad is not an affiliate or parent company of the laboratory requesting the registration.

It is important to mention that the reform will enter into force gradually, depending on the type of medication and according to the following:

- The day following its publication with regard to its observance in the case of antiretroviral medications;
- Six months after its publication for the case of vitamins, vaccinations, serums, blood derivatives, anti-toxins, biological hormonals, homeopathic medications and herbal medications;
- Twelve months after its publication for biotechnical and biological medications not specified in the above paragraph;
- Sixteen months after its publication for medications that contain narcotics or psychotropics and medications of free access in accordance with sections I, II, III, V and VI of article 226 of the General Health Law, and
- Twenty-four months after its publication for the other medications pursuant to the terms of section IV of article 226 of the General Health Law. •

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