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Current trends on judicial declaration of employment relationships

Chilean case law is constantly redefining the limits of employment relationships and whether or not a specific service agreement between an individual and another individual or entity may be deemed as a labor contract. In fact, during the last decade the Labor Courts have been increasingly expanding the notion of what must be understood as a labor relationship, making applicable all labor and social security regulations to services providers that were considered as autonomous, independent contractors in the past.

Such evolution is possible due to the flexible terms in which employment relationships are defined and regulated under local law. In this sense, the Chilean Labor Code defines the employment contract as any agreement (written or unwritten) whereby an employee undertakes to personally carry out services under dependence and subordination for the benefit of another person or entity (the employer) who, in turn, shall pay the employee a certain compensation for such services. Therefore, whenever remunerated services under dependency and subordination exist, an employment contract will be implied by law, even if there is no written evidence of such contract, and even if the employees are formally hired by another entity or have agreed and executed an agreement as an independent contractor with the company.

The existence of subordination and dependency is a factual matter that depends on the occurrence of certain external manifestations. According to the traditional opinion of the Labor Board and the Labor Courts, such manifestations include, among others, the existence of a working schedule determined by the alleged employer; the obligation to attend the company's offices or facilities on a continuous basis to perform the services; the payment of a fixed, periodic remuneration; the obligation to follow the company's policies, directions and instructions; the employee's reporting obligations to the alleged employer; the application of unilateral decisions of the company regarding supervision, discipline and termination of the relationship; the use of the company's uniforms, business cards, work supplies, etc. The catalog of elements that may be taken into consideration for the purposes of declaring the existence of a labor relationship is far from being strictly determined, whereas labor judges have broad discretion to decide whether or not the abovementioned external manifestations are sufficiently intense, consistent and/or numerous to constitute an employment contract.

However, recent Courts' decisions demonstrate that labor judges are leaning towards reducing the standards required to declare the existence of a labor relationship. In this regard, an important sphere of discussion has been centered on the services provided by sales agents of different industries, who are commonly compensated with commissions that are calculated as a percentage of the price of each sale operation executed. While certain autonomous salesmen had been considered as independent contractors in the past, ultimately Labor Courts have been especially responsive to labor claims filed by sales agents who allege to be under a subordination regime notwithstanding having a services agreement. In this sense, there have been some Courts' decisions declaring as labor relationships the services agreements held by agents who sell products from catalogs and certain insurance sellers, on a case-by-case basis. For these purposes, the Courts have disregarded the lack of working schedule and the absence of attendance obligations, and have emphasized instead the existence of sales goals, mandatory meetings and other directions imposed to the agents.

Another relevant milestone was settled when independent packers at supermarkets started to obtain judicial declarations of employment relationship. In the local supermarket industry, it was a vastly common practice to allow students and young, unqualified people to attend packing tasks in supermarket check-outs in

exchange for customers' tips. Even though compensations were paid by clients and not by the relevant companies, the Courts started to consider that the packers' activity was so highly regulated by supermarkets that they could not be deemed as independent personnel, being in reality actual employees of the company. The practice of providing uniforms, assigning supplementary tasks and determining fixed schedules available for packers were key points in such declarations.

A major discussion will probably take place regarding transportation and delivery services provided by registered users of certain smartphone applications. In these cases, the service schedules are extremely flexible and there is an absolute absence of physical supervision. However, some voices claim that the manner in which the transportation or delivery is provided has a thorough regulation issued by the virtual company, which would demonstrate the "telesubordination" to which the associates are subject. Online transport firms have already been sued by drivers and deliverers claiming to be dependent employees, especially as a consequence of unilateral blocking of the application use by the company. So far, however, the few rulings issued in this matter have been unfavorable to claimants, given the lack of disciplinary actions if the user does not log in during an extended period of time, or if refuses to accomplish a specific transportation or delivery petition.

Regarding these virtual applications, public debate and proposed legislation have been more concerned on regulatory issues coming out from the compliance by these virtual companies of all applicable regulations established in transportation and taxation laws and regulations. Nonetheless, it is likely that in some point of the discussion there will be opposed views on the legal status of these services providers as either employees or independent contractors. The latter, especially considering that there are almost 100,000 drivers in Chile registered in the two main online transport applications, and many other users of other transportation and delivery smartphone softwares. As a result, there is an increasingly relevant part of the workforce being absorbed by these virtual companies, all of which is having a big impact on both the users' social security contributions and the labor paradigm in general terms.

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