Abril, 2019
Newsletter 29

International Legal Partners

Actualidad Legal / Legal News

Chile • Ecuador • Germany • Mexico • Peru • Spain

Chile:
Law 21.133, law that incorporates self-employed persons to the Social Security System

On February 2nd, 2019, Law 21.133 came into force. This law incorporated self – employed persons to the social security system, in a definitive and compulsory manner. Therefore, from now on, self – employed persons must quote for Disability and Survival Insurance (SIS); Occupational Accidents and Illnesses Insurance; Child Accompaniment Insurance; Health; and Retirement Pensions (in that order of priority), with some exceptions.

Read more | 6 minutes

Chile:
Ley 21.133, ley que incorpora a los trabajadores independientes a los regímenes de Protección Social

Con fecha 02 de febrero de 2019, fue publicada la ley 21.133, que incorporó, de manera definitiva y obligatoria, a los trabajadores independientes a los regímenes de protección social. Por ello, éstos deberán cotizar para Seguro de Invalidez y Sobrevivencia; Seguro de Accidentes Laborales y Enfermedades Profesionales; Seguro de Acompañamiento de Niños/as; Salud; y Pensiones (en ese orden de prelación), salvo excepciones.

Leer más | 6 minutos

Spain:
The three keys to debt collection

Read more | 6 minutes

España:
Las 3 Claves para Cobrar Deudas

Leer más | 6 minutos

Mexico:
Responsibility and Prevention of Crimes committed by Legal Entities

Read more | 2 minutes

México:
Responsabilidad y Prevención de Delitos cometidos por Persona Moral

Leer más | 2 minutos

Peru:
Peru regulates the rule on Final Beneficiary in legal persons

Read more | 2,5 minutes

Perú:
Perú reglamenta la norma sobre Beneficiario Final en las personas jurídicas

Leer más | 2,5 minutos

Germany:
EU gives 'high-level' protection to whistleblowers

Read more | 2 minutes

Alemania:
La UE protegerá a quienes denuncien fraudes y malas prácticas

Leer más | 2 minutos

Chile:
Law 21.133, law that incorporates self-employed persons to the social security system

Estudio Jurídico Otero

Chile

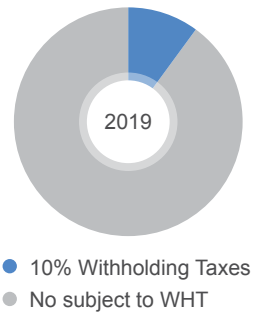
On February 2nd, 2019, Law 21.133 came into force. This law incorporated self – employed persons to the social security system, in a definitive and compulsory manner. Therefore, from now on, self – employed persons must quote for Disability and Survival Insurance (SIS); Occupational Accidents and Illnesses Insurance; Child Accompaniment Insurance; Health; and Retirement Pensions (in that order of priority), with some exceptions.

The obligation to quote for social security system for self – employed persons was implemented gradually, with the social security system reform in 2008. Before that year, self – employed persons, at the moment of paying their taxes on April of each year, could choose, either to quote or not to quote for social security system. In practice, this was not done, since most of the self – employed persons opted not to pay for social security system at the time of applying for their tax return.

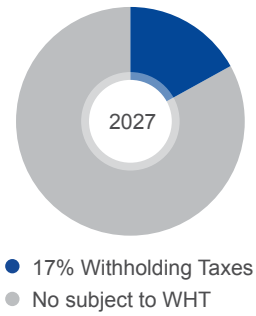
Law 21.133 establishes the obligation (without being able to opt to be exempted) for self-employed persons to quote for the social security system, charging it to the withholding of 10% of taxes that is made from the receipt they issue for their services, during the annual tax returns that must be issued to the Tax Administration (SII) in April of each year. Nevertheless, the amount or percentage that will be withheld from the receipt issued by the self-employed persons, will gradually increase and will be used to cover their social security quotes.

The percentage of withholding taxes will increase by 0.75% per year, until it reaches a 17% of withholding taxes in the year 2027. That means that in 8 years from now, the percentage of withholding tax intended for this purpose (payment of social security) will increase from 10% to 17%, on a taxable base of 80% of the annual gross income (“Total Taxable”).

Taxable Base (80% annual grosss income) 2019



Taxable Base (80% annual grosss income) 2027



According to the new law, the self-employed persons who will be obliged to quote for social security, will be those that issue receipts for a gross annual income equal to or larger than 5 Minimum wages, or higher than the product of multiplying twelve per 60UF (Unidades de Fomento, Chilean currency unit indexed according to inflation).

This law seeks that self-employed persons have coverage, benefits and rights in the areas of health, sick leave, maternity leave, absence leave, occupational accidents and illnesses and retirement pensions in the same terms as workers dependents on an employer.

- **Amount that self-employed workers must quote**

The Tax Administration will calculate annually the amount of quotes for social security to be paid by the self-employed person, and the payment thereof will be made in the annual tax returns to be submitted every year, charged to the tax refunds withheld on the previous year's receipts (10% which will gradually increase until reaching 17% in the year 2027).

Thus, in 2019, the payment of social security will be made charged to the amounts withheld from the receipts that were issued from January to December 2018, giving coverage from July 1st, 2019 to June 31st, 2020.

- **Those who are not obliged to pay social security quotes**

Under this law, all self-employed persons who receive payments for independent activities, and incomes for receipts issued for services provided to third parties are required to pay social security quotes, except:

a) Men over 55 years of age and women over 50 years of age as of January 1st, 2018 (they have 10 or less years left to be able to retire).

b) Affiliates to other retirement pension systems (other than AFPs).

c) Those who have paid social security quotes as dependents workers for the maximum taxable limit (79.3 UF per month).

d) Those who receive an annual income of less than 5 minimum wage (IMM), that is, those who have an annual gross income for less than $ 1.5 million Chilean pesos (according to the IMM value at April 2019, which is $301,000 Chilean pesos).

e) Workers who receive retirement pensions for old age or total disability.

- **Persons who are dependent workers and self-employed at the same time**

If a person simultaneously receives salaries, as a dependent worker, and income, as self - employed, to calculate how much should be paid for social security from his withholding tax, the Tax Administration will determine its tax base by adding both incomes in order to apply the annual limit established, according to what will be determined by a general norm (which has not yet been regulated).

- **How the payment of social security materializes**

There are two options for the payments for social security quotes. One for the total of the taxable income, with full coverage, and another option that will allow to quote for health and pensions, for a lower tax base, with partial coverage. Under the option of "full coverage", the totality of the amounts of taxes withheld from the previous year's incomes (now equivalent to

10% of the taxable amount, but that will gradually reach 17%), will be used to pay social security quotes. This option guarantees full coverage in the different areas of the Chilean social security system.

The second alternative is "partial coverage", which maintains the option to receive a potential tax refund. However, this is a temporary alternative since the tax refund percentage will decrease over time.

With this alternative, in this first year of the law´s validity, the self-employed persons can choose to quote on the 5% of their taxable income; eventually, it will be possible to choose to pay 17%, thus reaching 100% of social security coverage, (of 80% of the total income represented by the tax base).

However, under this alternative to choose to quote partially for social security, the coverage obtained in the different areas of the Chilean social security system will also be partial.

The possibility to choose between this two alternatives (partial or full coverage) will be able in each annual tax returns in the transition period between 2019 and 2027.

- Questions that the implementation of the law has left

  - Many of the questions about the implementation of the law are due to the fact that the regulations that will define the concrete way in which the law must operate have not yet been issued (It has been reported that there would be at least three regulations). This implies that there are several subjects of the law on which there is no knowledge and it is not known how they will be resolved.

  - There are self-employed persons who already pay their social security quotes voluntarily and monthly. What happens to them? What will happen if the self-employed person continues paying monthly their social security quotes completely? Will they be entitled to recuperate the amount that they paid in excess to the respective institutions given that the same amounts where charged to the withholding tax during the annual tax returns? If the withholdings do not cover all of the worker's plans (Isapre, AFP), how will the employee know what balance or differential he must pay and when?

  - It is not clear what will happen to those who change their status from exclusively dependent worker to exclusively self-employed, or vice versa.

  - If a person was a dependent worker during 2018 and self-employed in 2019, there will be

no withholding tax to pay the social security quote for the period from July 2019 to June 2020. The self-employed person would have to quote voluntarily for his social security for the period from July 2019 to June 2020, and what was withheld from his 2019 receipts will be used to pay for the social security quotes from July 2020 until June 2021.

- Regarding self-employed persons who pay their health insurance in the private system (Isapre), the new coverage system regulated by this law will only cover the legal 7%, and the differential amount that results between that percentage and the amount agreed with the Isapre must be paid directly by the worker, but this has not been regulated how.
- Despite the criticisms that this law arouses, it changed the way in which the self-employed persons annually pay their social security quotes, and this will allow them to pay future coverage and not debt, which guarantees effective protection or benefits at least in part.

Spain:
The Three Keys to Debt Collection (and 5 other keys which you probably ignore)

ILP Abogados

Spain

Broadly speaking, the three keys to debts collections are: 1) Processes 2) Experience and 3) Professionals.

In the Game of Thrones, the Lannisters are known to always pay their debts; unfortunately, in the real world is not always the case. In fact, particularly in B2B companies, commercial debts are one of the main causes of companies' bankruptcies. And, defaults on payments affect just as much to big companies as to small and medium-sized enterprises or to micro-companies and freelancers. And although certainly financial crisis increases the frequency of defaults, good times of economy would not eradicate them either.

Jorge Manrique wrote a verse about death five centuries ago that could perfectly apply to defaulted payments: "And those who live by their hands and the rich are the same."

Therefore, regardless of whether your company was in one category or another, this article will be of interest to you. Because we are going to deal with how to proceed with debt collection at Court in this article. What "weapons" to we could employ and what can we expect from our opposition.

We will not go to chapter III of the Spanish Civil Code, which regulates "Obligations and Contracts". What we are going to do, instead, is expose some of the conclusions we have drawn after more than 10,000 claims of default payment. They are individualized cases, from all different sectors and with preeminence of B2B businesses.

These cases were consisted of hundreds of lawsuits, thousands of writings and tens of thousands of hours in courts all throughout Spain. We have learned from many victories and some painful defeats.

Some of which, we will share with you right now, the rest we are reserving for our clients:

1) Time is of the essence, that is, the time-term is essential

And, we are not talking about suing before the statute of limitations is due, but to however, act with immediacy. And this for several reasons:

If the debt is recent it means that the commercial activity is also. Meaning that the company is still up and running, which is in the market. It results are always better when one tries to collect from an active debtor. Because they have something to lose and something to protect, because, except for rare exceptions, the debtors do not have a one single creditor as well as, they tend to be going through serious difficulties and they have to default as a method of financing, or for any other reason. A debtor usually has several debts and several creditors, and all their creditors will compete to be collect their debts from the same assets. And as it happens in the African Savannah, a lion differs from a hyena at the time of eating.

2) Your market must know that your company is No Flexible when it comes to collecting debts

As we said in point 1, debtors usually have more

than one creditor. And in the struggle of keeping the company in good shape or being the favored victims, the court will to pay off who they consider weaker.

And, usually, there should be only two variables that influence our decision, need and fear. The need, i.e. the services or products that we commercialize are essential for the continuity of a debtor's company and is not a parameter that we could control. Sometimes our products or services would be essential for the "possible" debtor. On other occasions, given that we compete in a huge and global market, we would be one of the many suppliers.

The second variable is fear and this variable is, however, in our power to control. It is important because the debtors, feel more inclined to pay the stronger creditors among them all. And for the record, we're not talking about intimidation, meaning not to hire an operator that calls the debtors hundreds of times.

No, what we say is that your clients must know they will be sued if they think about default on their payments and if they fail to meet the payment. That they will be sued under all circumstances. That they will be sued, even if there is no guarantee of recovery. That they will be sued, even if they are lifelong clients. This is nothing personal, but that's how your company works. Any negotiations and agreements are not affected, of course, but with these conditions already presented.

Why? Well, because your market can tell if the usual threat of a debt collection letter and a phone call would be real or not. And if they know about the validity of a threat, not paying you would be an acquired and continuous strategy of the firm. In the short term threatening without demanding can result in something, in the medium term these results would disappear. And in the long term, the infinite debt collection letters and the repetitive calls are tremendously counterproductive.

Therefore, it is essential to achieve a reputation of a strong standpoint in front of clients. Even though sometimes it seems like it looks contradictory to the company's economic welfare. Because suing only when you have the absolute certainty of collecting debts can lead our debtors deciding more often to pay someone else than us.

3) Avoid the contracting general conditions

This is one of those tips that is easier to give than to implement, but of growing importance lately. General contract conditions, listed below, have been an essential element on large-scale contracting, including B2B businesses. And, when the amount of the contracting is small, it may still make sense to use them. However, there are certain relevant contracts that would be counterproductive to operate under these general conditions.

The general conditions (i) are regulated in a

specific and strict manner (ii) they usually predispose the judge against the company that uses them, (iii) they are reviewable ex officio (iv) they are more and more often canceled for its abusive or incompressible nature (v) they make the forum selection clause useless, forcing us to sue in the domicile of the defendant.

Therefore, it is important that the company assesses the economic limit for the inclusion of the general conditions of contracting. And always and in any case make sure that they are legible (large print size) and understandable.

4) Consider the procedural options at your disposal.

In many cases, lawyers tend to initiate, without exception, the claims to payment with the filing of a small-claim. Its advantages are known to all, it is faster, more cost efficient, and can reach your goal faster too: execution and seizure.

Small-claim proceedings are like rolling a 6 in Parcheesi, is the perfect option until it had been rolled 3 times and forces you to send a pawn home. Because, when it is foreseeable that there will be an opposition, t<he small-claim court should never be the chosen option.

And you might think, but it is often not predictable, right? Yes, sometimes we cannot anticipate, but many other times we could. For this reason, small-claim proceedings should never be the chosen option when (i) we are facing a debtor who has protested the service and from whom we can expect an opposition (ii) we are facing a professional "debtor" in dragging out answers or (iii) we have to sue in a town with a lot of judicial delaying. In these cases, going to the verbal or ordinary proceeding, which would save time and money.

5) Know the most common excuses of debtors facing a claim and prepare in advance how to refute them

The causes of opposition to payment claims are not assessed, contrary to what happens in foreign-exchange. In theory, the type of answers we receive could be infinite leaving aside the procedural exceptions. However, 10,000 legal proceedings show us that, in B2B complaints, 90% of the oppositions are coincidental. And they are based on some of these arguments or a combination of them:

- No contract in place. Mainly alleged, when-beside the invoices- there is no more documentation accrediting the service or the purchase-sale.
- Failure to sending invoices
- Incorrect, excessive, or non-consensual billing
- Exception of a contract that has not been fulfilled or has been fulfilled in a defective manner (Non adimpleti contratus, non rite adimpleti contratus)
- Inapplicability of the general conditions.

That is why it is fundamental that your lawyer knows your business, because he or she is your voice in the Court. As Sun Tzu said in the Art of War,

> “If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.”

Mexico:
Responsibility and Prevention of Crimes committed by Legal Entities

Bitar Abogados
Mexico

According to with the amendment of the Código Nacional de Procedimiento Penales (**CNPP**) published in the Federal Official Gazette on March 5, 2014, and the amendment of the Código Penal para el Distrito Federal (**CPDF**) published on December 18, 2014, a Legal Entity (hereinafter the **COMPANY**) shall be subject to criminal liability for acts committed by an individual, for their own benefit or for the benefit of the **COMPANY**.

Article 421 of the **CNPP** states that *"... Legal entities shall be criminally responsible for crimes committed on their behalf, for their benefit or through the means provided by them, when it has been determined that there was also* ***noncompliance of the due control in its organization...*** *"* Likewise, the article 27 bis of the **CPDF** indicates that the **COMPANY** will be criminally liable for crimes committed by individuals, when the **COMPANY** has not exercised on its employees, executives, legal representatives, administrators, etc., the **due control that corresponds to the organization of the COMPANY.**

From the foregoing the **COMPANY** has the responsibility to observe and carrying out the preventive measures that judge pertinent and to let the employees to know such preventions, as well as to the shareholders, members of the board of directors and legal representatives, with the object of preventing criminal actions.

But until what point it is considered that there was a noncompliance of the due control? The legislation is silent to indicate what it is due control, which leaves the **COMPANY** in a state of uncertainty, because, it is up to the judgement of the Public Ministry to determine whether the **COMPANY** complied or not with the due control.

As a result of the foregoing, it is recommended that the **COMPANY** implement a Manual of Operation and Prevention of Crimes that not only contains the operational processes of its activities, but also to include politics and mechanisms for the prevention of crimes, presentation of complaints within the **COMPANY** and/or, if applicable, before the Public Prosecutor's Office, as well as training, dissemination of information and training programs for its employees, executives, legal representatives, members of the Board of Directors and/or Shareholders, on a regular basis, for that they know and are continuously aware of any crime that may be committed, as well as that they are aware of the legal, labor, civil and criminal consequences that are generated by the improper handling of their activities.

From the above, in order to demonstrate to the corresponding Authority, that the **COMPANY** is in a constant state of vigilance, in order to avoid any crime activity that leads to a suspension of activities, closure of establishments, or the dissolution of the activity by a court order.

By: Lic. Adilen Coronel Aguirre

Peru:
Peru regulates the rule on Final Beneficiary in legal persons

Estudio Laos, Aguilar, Limas & Asociados

Peru

The Peruvian Government, within its economic and governmental policy of adapting legislation to international standards and recommendations (issued by the Organization for Economic Cooperation and Development-OECD, to fight against tax evasion and evasion, money laundering and financing of terrorist groups), has promulgated Legislative Decree No. 1372 and its Regulations approved by Supreme Decree No. 003-2019-EF that has entered into force this 2019.

First, we must start to define what is meant by "final beneficiary". Thus, according to the aforementioned legal provisions, "final beneficiary" is defined as:

> those natural or legal persons or assets that own or control legal persons or legal structures (situation in which ownership or control is exercised through a chain of ownership or indirect control) or control a customer or on whose behalf a transaction is made.

It should be noted that in Latin America there are 16 countries that, grouped in the Financial Action Group of Latin America, have committed themselves to strengthen cooperation among member countries in order to combat elusion and evasion. Among others, the countries that are part of this group are Argentina, Ecuador, Colombia, Panama, Costa Rica, Uruguay, Spain.

In this sense, the enacted norm, as well as its peers in the mentioned countries, is intended to grant the competent authorities' timely access to accurate and updated information on the final beneficiary of the legal entity or legal entities in order to strengthen the fight against tax evasion and avoidance, guaranteeing assistance and cooperation between countries.

Among the criteria established for determining the final beneficiary, we have:

a) The natural person who directly or indirectly through any form of acquisition owns at least ten percent (10%) of the capital of a legal person.

b) A natural person who, acting individually or with others as a decision unit, or through other natural or legal persons or legal entities, has faculties, by means other than property, to appoint or remove most of the organs of administration, direction or supervision.

c) In the case of trusts or investment funds, natural persons who hold the status of trustor, trustee, trustee or beneficiary group.

The information related to the identification of the final beneficiaries of legal persons and legal entities that is provided to the competent authorities in compliance with this Legislative Decree by law, accounting and financial professionals does not constitute a violation of professional secrecy nor is it subject to the restrictions on disclosure of information derived from the confidentiality imposed by contractual means or by any legal or regulatory provision.

Under this context, the obligated persons must present a declaration of final beneficiary before the SUNAT, identifying it and providing the supporting information, having the obligation to update and maintain it.

Germany:
EU gives ‘high-level’ protection to whistleblowers

ILP Global Mertens Thiele

Germany

Companies and public administrations are required to provide”safe channels” for reporting the information, both within an organisation and to public authorities

The legislation marks the first time whistleblowers are given EU-wide protection The corresponding rules have previously been in the hands of member states, resulting in a range of vastly different approaches.

Whistleblowers across the European Union have won greater protection under landmark legislation aimed at encouraging reports of wrongdoing. The new law, approved by the European Parliament a few days ago, shields whistleblowers from retaliation. It is also bound to provide “safe channels” to allow them to report breaches of EU law.

The new legislation gives whistleblowers who report breaches of EU law a “high level of protection”. It establishes “safe channels” for reporting the information, both within an organisation and to public authorities. If no appropriate action is taken or in cases where reporting to the authorities would not work, whistleblowers are permitted to make a public disclosure – including by speaking to the media.

The legislation protects whistleblowers against demotion, dismissal and other forms of punishment.

The legislation states that whistleblowers play a “key role” in preventing breaches of EU law and protecting society. It however as well asserts, that potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. The idea therefore is that whistleblowers should be protected from being punished, sacked, demoted or sued in court for doing the right thing for society.

The european legislator is convinced that this will help tackle fraud, corruption, corporate tax avoidance and damage to people’s health and the environment. This defenitely seems to be the case. It is very likely that this “pathbreaking legislation” will also give employers greater legal certainty around their rights and obligations and thereby improve the corporate culture of european business. Time will however have to tell, if these highflying european hopes will be ultimately met by the implemantation of this new piece of legislation.