COVID-19 LATIN AMERICAN COMPARATIVE GUIDE ON LABOUR ISSUES

SECOND PART

ARGENTINA

1) How is the independent contractor/self-employed worker defined in the legal regime of your country?

There is no specific definition in the argentine legislation for independent contractors or self-employed workers. These are understood to be people who carry out an economic activity on a regular, personal and direct basis for profit, without an employment contract. Because of this lack, independent contractors do not have technical, economic or legal subordination –these three are the main characteristics of the employed relationship-.

Therefore, they are not under the scope of the Employment Contract Law (*Ley de Contrato de Trabajo "LCT"*) or any other labor law: they are not bounded to a labor regime (such as specific place or amount of hours), nor to receiving orders; buy neither do they receive leaves, paid holidays, or a minimum salary, among other benefits.[1]

Independent contractors are divided into two categories: the ones included in the special or simplified regime (hereinafter "*monotributistas*") and the ones included in the general regime (hereinafter *"autónomos"*).

The substantial difference between them is the amount of annual billing: *monotributistas* have a limit of one million seven hundred thirty nine thousand four hundred ninety three pesos ($1,739,493 – approximately USD 26,761, current exchange rate USD1 = ARS 65) if they are service providers, and a limit of two million six hundred and nine thousand two hundred and forty pesos ($2,609,240 – approximately USD 40,142) if they are traders. If the *monotributista* exceeds this amounts, he/she will be "switched" to the general regime and, in consequence, pay other taxes.

In order to define the regime in which the independent contractor should be registered in, other facts –besides the annual billing- must be taken into account, such as: consumed energy, annually paid rentals, square meters where the activity is carried out and, in the traders' case, the maximum unitary price of the items to be sold.

Notwithstanding the foregoing, according to section 23 of the LCT "the rendering of services presumes the existence of an employment contract, except that, due to the circumstances or relationship, is proven otherwise. This presumption will also operate if non-labor figures are used, as long as, due to the circumstances, it is not possible to qualify as an employer to whom renders services".

In consequence, the rendering of services establishes the presumption –except that otherwise is proven- of the existence of the labor contract. Therefore, there is a legal presumption about the existence of a dependent employment relationship whenever one person renders services to

[1] "Manual de Derecho Laboral" Julio Armando Grisolía, Abeledo Perrot editorial, 2016, Chapter I "TRABAJO HUMANO. DERECHO DEL TRABAJO. POLÍTICA SOCIAL", Page 9.

another. This causes the reversal of the burden of proof and, therefore, the employer is in charge of proving that the dependent employment relationship never existed.

In practice, if a conflict shows up, it is frequently argued by independent contractors that an employment relationship existed, but this one was inadequately registered, based on the application of the principle of "primacy of reality", along with the presumption mentioned in the precedent paragraph.

Regarding the principle of "primacy of reality", this means that in order to define the existence of the employment contract, the judge must base his analysis on this principle, which gives priority to reality over documents or the parties' manifestations: objective data arising from the content of the relationship must prevail

2) Is there a Social Security regime applicable for independent contractors/self-employed workers in your country?

Yes, both *monotributistas* and *autónomos* have a special tributary regime.

The first ones are charged with the monthly payment of a fixed sum (fee) that depends on the category in which they are registered. In turn, the category is defined based on their annual billing, and a "re-categorization" must be done every six months.

With the payment of this fee, the *monotributista* ensures the payment of: i) welfare contributions; ii) retirement contributions; iii) the regime's own tax. However, only this last one is mandatory, and both the welfare and retirement contributions are optional, so the taxpayer is enabled to choose another pension fund to contribute, or to pay –directly- the monthly fee to the welfare fund.

Within the simplified regime, in addition to the "regular" *monotributistas*, are the so-called "*monotributistas sociales*". This category provides the same functionality as the previously mentioned one, but its main purpose is to foster the productive, commercial and service activities of the population in a situation of social vulnerability. In such way, those who have a single economic activity can access this regime, and the monthly fee is much lower than the one the "regular" *monotributistas* pay, as well as the maximum limit of billing.

On the other hand, individuals under the general regime –*autónomos*– are charged with a monthly fee, whose amount also varies depending on the annual billing. This fee represents just the retirement contributions, ever since the welfare contributions must be done directly to the welfare fund.

However, if there is a conflict regarding the nature of the relationship between the private individual and the services' beneficiary, the judge could determine a debt of social security withholdings and contributions if the dependency relationship is proved.

3) **In case of affirmative answer in question 2): point out the risks coverage regulated in the Social Security regime applicable to independent contractors/self-employed workers**

There is no protection foreseen in the argentine legislation regarding risks applicable for independent contractors or self-employed workers, due to the fact that both, *autónomos* and *monotributistas* work at their own risk.2

There are some insurances available, but since they are not mandatory for all professions, hiring them –or not– is up to the independent contractor's will.

As an example, personal accident insurances contemplates death coverage, total and permanent disability, and the medical or pharmaceutical assistance that the insured may require as a result of the accident.

Notwithstanding the foregoing, there are some liberal professions in which insurances are mandatory, such as responsibility insurance for malpractice for health professionals.

4) **Has the National Government taken any concrete measures to support independent contractors/self-employed workers during the health crisis due to the COVID-19 outbreak? In case of affirmative answer, point out specifically the actions taken.**

In the framework of the health emergency due to the COVID-19 outbreak, the National Government granted an Emergency Family Income (*Ingreso Familiar de Emergencia – "IFE"*) for social *monotributistas* and *monotributistas* under the categories A, B, C and D (the lower ones). Those categories includes individuals whose annual billing is up to six hundred twenty-six thousand two hundred seventeen Argentine pesos (ARS 626,217) –approximately USD 9,634-. This Family Income consists on the granting of a single amount of ten thousand argentine pesos (ARS 10,000) –approximately USD 153- to be paid as of April, 2020. In order to apply to the IFE, the potential beneficiaries must comply with the following requirements: i) being a native or naturalized and Argentinean resident, with a residence of, at least, two (2) years; ii) being over eighteen (18) and under sixty-five (65) years old; iii) the applicant or his/her family members may not have another source of income (there are some social programs excluded). Regarding this last requirement, it is established that only one (1) member of the family may perceive the IFE, and women have priority.

Also, by means of Decree No. 332/2020, the National Government created the Emergency Assistance Program for Employment and Production (hereinafter "ATP" or "the Program"). Originally, this Program included four (4) different types of benefits, but none of them included independent contractors/self-employed workers. For this reason, days later, the Program was modified through Decree No. 376/2020 and the Zero-Rate Credits were created.

Zero-Rate Credits are loans granted by the National Government to individuals included in the simplified and general regime - *monotributistas* and *autónomos*- who had suffered a substantial decrease in their billing after March 12, 2020. This loan must be requested by the independent

[2] "Manual de Derecho Laboral" Julio Armando Grisolía, Abeledo Perrot editorial, 2016, Chapter I "TRABAJO HUMANO. DERECHO DEL TRABAJO. POLÍTICA SOCIAL", Page 9.

contractor and, if the application is approved, the amount will be accredited in the beneficiaries' credit card (this means that the loan is not received in cash) in three (3) equal and consecutive installments. The subsidy of the credit's total financial cost is of one hundred percent (100%). Therefore, no interest will be accrued, and the beneficiary will return the same amount received.

The amount to be received will depend on the category that the independent contractor belongs to, but it may not exceed one hundred and fifty thousand argentine pesos (ARS 150,000) – approximately USD 2,307-.

In addition, besides the monthly installments of the Zero-Rate Credit, each beneficiary will receive, each month, an additional amount equivalent to the fee that the independent contractor must pay based on his/her category.

5) How is the informal worker defined in the legal system of your country?

According to the argentine legislation, it is considered that an employee has been registered when the employer included him/her:

a) In the special book of salaries, in which all personnel under an employment relationship must be included (under the provisions of section 52 of the LCT);

b) In the Social Security Authority's records (*Administración Nacional de la Seguridad Social "ANSeS"*).

Therefore, employment relationships that do not comply with the aforementioned requirements will be considered as unregistered or informal according to section No. 7 of the National Employment Law (*Ley Nacional de Empleo* - "LNE")-.

Consequently, based on the presumption explained in question No. 1, an informal worker is an independent contractor hired under a non-labor regime, such as a rendering-services agreement, and who renders services on behalf of a third party in exchange for a monetary compensation.

In this sense, in order to determine if an independent contractor is an unregistered employee, the legal, technical and economic subordination notes must be given.

Below, the main characteristics of each type of subordination:

- Technical subordination: it is related to the employers' power to give orders that the employee must comply with. Therefore, the employee submits his/her workforce to the employers' objectives and targets.
- Legal subordination: it is related to the hierarchical relationship between the employer and the employee, and consists on the employer's legal possibility to direct the employee's behavior towards the company's objectives. In consequence, the employee is submitted to the employers' authority: power of organization, direction, control and discipline.
- Economic subordination: it involves the following issues: i) the employee does not participate in the employer's profits; ii) the employee does not receive the final product of his/her work; iii) the employee does not share the company's risks; iv) the employer puts

his/her workforce at the employer's disposal in exchange of a compensation; v) the profits or losses derived from the employer's workforce are unrelated to him/her, and only benefit or harm the employer.

6) What kind of protection does the Social Security System provides to the informal workers in your country?

The fact that an employee is registered implies that the employer declares before the National Tax Authority (*Administración Federal de Ingresos Públicos "AFIP")* that he/she works for him/her, and it represents some benefits for the employee, as well as obligations for the employer.

When an employee is registered, the employer has the duty to pay certain taxes, such as mandatory life insurance, the labor risks insurance's fee, and pension, health-insurance and union trade contributions.

The social security contributions are composed of employees' withholdings (which are amounts withheld from their salaries) and contributions made by employers.

All registered employees over the age of eighteen (18) years old are covered by a national retirement pension scheme formed by employee's withholdings equal to seventeen percent (17%) of their gross salary with a cap of one hundred seventy-three thousand nine hundred forty-five argentine pesos with 70/100 (ARS 173,945.70 -approximately USD 2,676-), and employer fixed contributions. The percentage of the employer's contribution depends on the type of activity (twenty-six with four percent (26.4%) for commerce and twenty four percent (24%) for any other activity) with not cap.

The withholdings and contributions are the following:

a) Pension system:
   - Employees' withholdings: 11%
   - Employer's contributions: 12.35% / 10.77%

b) Family allowance system:
   - Employees' withholdings: -
   - Employer's contributions: 5.4% / 4.7%

c) Unemployment fund:
   - Employees' withholdings: -
   - Employer's contributions: 1.08% / 0.94%

d) Health medical services for retired people ("*Programa de Atención Medical Integral"* or *"PAMI"*):
   - Employees' withholdings: 3%
   - Employer's contributions: 1.57% / 1.59%

e) Health care insurance:

- Employees' withholdings: 3%, and an additional 1,5% per beneficiary covered under the employee's health coverage plan (the employee's primary family group)
- Employer's contributions: 6%

f) Labor Risk Insurance:

- To be quoted by the Labor Risk Insurer ("ART")

g) Life Insurance:

- Employees' withholdings: -
- Employer's contributions: approximately, ARS 19.03 (approximately USD 0.29)

Therefore, if an employee provides his/her services under a dependent relationship, but this relationship is not correctly registered, he/she will have no protection: he/she will not have life insurance, retirement contributions, health-care insurance, nor trade union that protects him/her, and no insurance in case he/she has an accident during working hours or during the trip from his/her home to the working place of from the working place to his/her home.

Notwithstanding the above, the non-registered or wrongful registered employment relationship, by application of the presumption referred to in answer 1 along with the "primacy of reality" principle, is severely punished in Argentina. Therefore, in addition to the amount that may eventually correspond in case of the employee considers himself/herself constructively dismissed, there are extra fines for the employer who did not registered the employment relationship of registered it wrongful.

Below, the legal standards regarding these fines:

a) In the first place, section No. 8 of the LNE deals with those unregistered labor relationships, and establishes that employers who do not register the labor relationship must pay the employee a compensation equal to a quarter part of the accrued salaries since the beginning of the relationship, updated to the current legal standards. This means a protection to the unregistered employee, ever since it guarantees a compensation for the lack of labor registration.

b) Section No. 9 of the LNE refers to those cases in which the employer registers the labor relationship, but declares a false employee's starting date, and does not register the period between the real starting date and the false one (registered). The applicable fine is equivalent to a quarter part of the amount of all salaries that the employee received -or should have received- during the unregistered period.

c) Regarding the fine established in section No. 10 of the LNE, this one regulates those cases in which the employment relationship is registered, but consigning a lower salary compared to the one the employee actually receives. In this cases, the fine will be equal to a quarter part of

all the accrued and unregistered salaries, updated from the date in which the salary was wrongly registered.

d) It is important to highlight that, regarding the fines explained in points a), b) and c), section No. 11 of the LNE establishes that they will only proceed if the employee –or the trade union that represents him/her- comply the following formal requirements:

- Make a formal request to the employer to register the employment relationship, to correctly register the starting date or to properly register the salaries' amount, as applicable
- Send to the AFIP a copy of notification made to the employer mentioned in the preceding paragraph, immediately or within the next twenty-four (24) hours.

In addition, with the mentioned formal request, the employee must indicate the real date of entry and the real circumstances that allow to classify the registration as deficient. If the employer replies and gives full compliance to the request within a thirty (30) day period, he/she will be exempted from the payment of the previously mentioned compensations.

e) The LNE also establishes, in section No. 15, that if the employer dismisses an employee with no cause within two years since he/she was formally requested to register the labor relationship, according to section No. 11 of the LNE, the dismissed employee is entitled to receive the double of the compensations that he/she must receive as a consequence of the dismissal.

Moreover, if the employer effectively grants the notice period, this period will be duplicated as well.

The duplication of the compensations will also take place if the employee considers him/herself constructively dismissed. The employer, in order to be exempted from this fine, must prove the lack of connection between the employees' decision to finish the employment relationship, and the absence or wrongly registration, and must also demonstrate that his/her abusive behavior was not intended to cause the termination of the employment relationship.

f) Law No. 25,323 establishes on section No. 1 that, in case of a deficient or lack of registration of the employment relationship, the seniority compensation will be duplicated, and it is not required that the employee notifies the employer previously.

g) Section 2 of Law No. 25,323 establishes that if the company does not comply in due time with the payment of the mandatory severance package, the individual may claim for interest and fines, in which case the company must pay an additional compensation equal to the fifty percent (50%) of the severance on account of the seniority, prior notice and pending days of the termination month. In this case, the notification to the employer regarding his/her fault is required.

h) Another applicable sanction is related to the delivery of working certificates that employers must deliver within thirty (30) running days from the termination of employment relationship. If the employer fails to comply with this obligation, it will have to pay a fine equal to three (3) salaries. Thus, since there is no registration of the labor relationship in Argentina, in case of a conflict, the employee may likely also request this fine.

i) Regarding the lack of payment of the corresponding withholdings and contributions, Also, the AFIP may also claim to the employer that he/she did not comply with the deposit of corresponding social security withholdings and contributions, and claim the amount accrued as capital, plus fines up to two hundred percent (200%) of the capital owed and monthly interests of approximate two percent (2%). The statute of limitation for this claim is ten (10) years.

Eventually, if the activity rendered by the individuals is governed by any particular Collective Bargaining Agreement ("CBA"), the corresponding trade union may claim the contributions not made. The percentage depends on the applicable CBA, but in general is between two percent (2 %) and five percent (5%) of the monthly compensation. The statute of limitation for this claim is five (5) years.

7) Has the National Government implemented any concrete measure on behalf of the informal employees during the health crisis caused by the COVID-19? In case of affirmative answer, identify the taken measures.

At the time, the only measure taken on behalf of the informal workers since the beginning of the COVID-19 outbreak is the IFE (mentioned in answer No. 4), since this benefit extends to: i) Informal workers; ii) Private households' employees; iii) *Monotributistas sociales*; and iv) *Monotributistas* under categories A, B, C and D.

8) In which way did the National Government protected companies, given the impossibility of normally producing during the health crisis? If necessary, make the distinction according to the company's size.

As mentioned in answer No. 4, the National Government created the ATP Program in order to help companies during the crisis due to the COVID-19 outbreak. This Program includes the following benefits, and one or more can be provided:

a) Deferment or reduction of up to ninety five percent (95%) of the Social Security contributions;

b) Compensatory Allowance for Salaries: it is an allowance paid by the National Government for employees of the private sector under a dependency relationship. The amount to be paid will be equivalent to the fifty percent (50%) of the employees' net salary of February, 2020. This amount must not be less than the amount equivalent to one (1) minimum salary, which is currently sixteen thousand eight hundred and seventy-five argentine pesos (ARS 16,875 - approximately USD 259) nor more than two (2) minimum salaries, equal to thirty-three thousand seven hundred and fifty argentine pesos (ARS 33,750 – approximately USD 519), or to the total net salary of February 2020;

c) Zero-rate Credits: already explained in answer No. 4;

d) Unemployment benefits: Unemployed people (who meet the necessary legal requirements) will be able to access an economic benefit that ranges from six thousand argentine pesos

(ARS 6,000 – approximately USD 92) and ten thousand argentine pesos (ARS 10,000 – approximately USD 153).

Those companies that want to access the benefits mentioned in points a) and b) must comply with the following requirements:

i) the company's main activity must be included in the list of affected activities, and it should have been critically affected in the geographical areas where it takes place;

ii) there should have been a billing decrease, in real terms, of approximately thirty percent (30%) after March 12, 2019, and the same date of the current year;

iii) there should be a relevant amount of employees affected by COVID-19, affected by the Mandatory Isolation, or exempted from the duty of attending the workplace (because they are part of the risk groups or because they are in charge of someone else's care);

In addition, the following restrictions must be complied with:

i) profits cannot be distributed for closed tax permits as from November 2019;

ii) shares cannot be purchased either directly or indirectly;

iii) companies will not be able to obtain securities in Argentine pesos for their subsequent and immediate sale in foreign currency or their transfer in custody abroad;

iv) expenses of any kind cannot be made to subjects directly or indirectly related to the beneficiary whose residence, establishment or domicile is in a non-cooperative jurisdiction or with low taxation (according to Sections 24 and 25 of Decree No. 862/19, regulatory of the Income Tax Law.)

Regarding the restrictions, is necessary to make a distinction between the companies that, as of February 29, 2020, had more or less than eight hundred (800) employees: companies that had more than eight hundred (800) employees must comply with these restrictions during twenty-four (24) consecutive months, and the ones with less than eight hundred (800) employees must do it during twelve (12) consecutive months.

It is necessary to bear in mind that the beneficiary companies will not be able to undertake the foreseen operations during the current month, and the twelve (12) or twenty four (24) (depending on the case) following months to the end of the financial period subsequent to the one in which the benefit was granted, including previous accumulated results.

The accomplishment of the mentioned requirements and restrictions is a condition to obtain the benefits. Therefore, the non-compliance is considered as a valid cause to remove the benefits, and the beneficiary is obliged to make the pertinent refunds of the Complementary Salaries received to the National Government.