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Labor and Tax Update

Publication of a Criterion issued by the Mexican Institute of Social Security related to home office

Mexico City, March 27, 2024

On March 22, 2024, the Official Gazette of the Federation published the Criterion number 01/2024/NV/SBC-LSS-27-I, issued by the Technical Council of the Mexican Institute of Social Security ("IMSS" per its Spanish acronym). This criterion states that the benefits related to home office arising from employer obligations to provide, install, and maintain the necessary equipment for telecommuting, as well as to assume the costs corresponding to said special work modality (including the payment of telecommunication services and the proportional part of electricity) shall not be considered part of the base contribution salary ("SBC" as per its acronym in Spanish), in terms of the Social Security Law.

In addition, the criterion establishes the activities that will be considered as an undue tax practice, including:

i. Anyone who delivers cash amounts to employees, through payroll or by any means, simulating that such payments are home office benefits, regardless of the denomination used in the accounting records, with the aim of excluding them as part of the SBC and thus avoiding the payment of social security contributions;
ii. Anyone who advises, counsels, or participates in the implementation of the practice mentioned in the previous paragraph, and
iii. The certified public accountant who issues an unqualified compliance opinion to employers who engage in the aforementioned practices.

Labor and tax considerations related.

It is important to point out that the Federal Labor Law ("LFT" as per its acronym in Spanish) provides special obligations for both employers and employees working under a home office modality. In June 2024, the Ministry of Labor published an Official Mexican Standard that provides broader and more specific regulation for home office: NOM-037-STPS-2023, Home Office - Conditions of safety and health at work (the "NOM"). It is important to consider that home office rules will apply to labor relationships where more than 40% of the work is conducted remotely. This percentage must be calculated based on the weekly work shift.

Article 330-B of the LFT provides that a home office agreement must be executed, outlining the requirements that must be introduced therein. Among these requirements is the payment for services at the employee's home. Article 330-E of the LFT sets forth the special obligations that the employer must fulfill, comprising "assuming the costs derived from work through the home office modality, including the payment for telecommunication services and the proportional part of electricity." The LFT does not indicate a specific amount or form in which this payment must be made, so it can be determined according to the position of the employer. In any case, the rules for the payment of this concept must be properly documented in the home office agreement, as well as under a policy implemented by the company (a requirement in accordance with the NOM).

From a tax standpoint, the authorities have not issued tax regulations or administrative rules specifying the tax treatment that payments for "costs derived from the home office modality" should receive. In this regard, it is not clear whether expenses can be deducted or the value added tax credited related primarily to electricity, telephone, and internet services incurred by employers under the home office modality. This is mainly because the employer would not receive a digital tax receipt ("CFDI" per its Spanish acronym) with their tax information, as these receipts would contain the data of the employee or even a third party.

Recently, new products have been marketed through electronic cards/wallets to cover home office expenses. It should be noted that these products are not currently regulated from a tax perspective, so it should be carefully analyzed whether through these products, the employer would have a better position to deduct expenses and credit the corresponding VAT.

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