# MEXICO OUTSOURCING HIGHLIGHTS. 2014


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Ernesto Velarde-Danache, Mexican Notary Public and Attorney licensed only in Mexico, was admitted to practice in 1982. He holds an LL.M from the University of Cambridge, of Cambridge, England.

Ernesto has spoken about doing business in Mexico in many different countries such as the United States, Canada, Italy, France, Portugal, England, Spain, India, Mexico, the Republic of Ireland, Switzerland, Netherlands, China, Singapore and Korea.

He has helped more than 300 companies start business in Mexico.

# OUTSOURCING IN MEXICO

The practice of outsourcing employment in Mexico gained substantial popularity in the manufacturing business since companies rendering those services designed several strategies so as to offer to their clients certain savings in social security and even wages by hiring their employees under different terms and conditions than those offered by the end customer.

Unfortunately, in some cases these "mechanisms" were not necessarily allowed by law and in many other cases the end users of the outsourcing setup knowingly abused the system so as to easily get rid of employees and avoid paying severance. This created a very attractive business worth several million dollars which caught the attention of some entrepreneurs who opened "personnel management" companies (alongside the true large companies providing serious outsourcing services) without necessarily having experience and financial strength to keep up with the rather intricate labor and social security system we have in Mexico.

As a result, the Mexican Federal Government tried to put a stop to abuses and to introduce the "outsourcing" or "sub-contracting" regime in our Labor Code as part of several amendments passed on November 30, 2012, and to be effective the next morning; the backbone of such change reads as follows:

**"Article 15-A.** Work under the regimen of sub-contracting is that by means of which an employer called a contractor executes works or renders services with his workers under his subordination, in favor of a contracting party, individual or company, which sets the tasks of the contractor and supervises him in the performance of the services or the execution of the contracted works.

This type of work, must comply with the following conditions:

a) It cannot span all of the equal or similar activities completely, that are carried out in the workplace.

b) It must be justified by its specialized character.

c) It cannot cover tasks equal or similar to those that are performed by the rest of the workers in the service of the contracting party.

When all of these conditions are not complied with, the contracting party will be considered the employer for all the purposes of the Law, including the obligations in matters of social security".

As you will see, items a), b) and c) set up the rules of the game in order to be considered as having a legitimate outsourcing arrangement with a third party. Unfortunately, many feel the amendment felt short of what was really needed (or at least being applied lately by custom) and basically killed the flexibility companies had to resort to outsourcing for day to day labor needs. The current interpretation of the "legally allowed" outsourcing services is basically that you may only hire them for specialized activities such as security (i.e. security guards on a manufacturing facility, bank, etc.), meal services (those companies providing food to the workforce), communications and other technical needs that do not have to do with the core business of the employer. At any rate, being such a new amendment it is still subject to the criteria to be issued by the administrative labor authorities and the judiciary, which are yet to come.

Nevertheless, the reform had a rather instant and strong impact, particularly on foreign companies doing business in Mexico which by a lack of clarity on the law and fear to be found not complying with it, decided to cut back on the outsourcing practice or even discontinue it.

The amendment to the law also provided for some other considerations and obligations when establishing such practice, as mentioned in the following articles:

"**Article 15-B.** The contract that is entered into between the individual or company that requests the services and a contractor must be in writing.

The contracting company must make sure that at the moment of entering into the contract made reference to in the preceding paragraph that the contractor has the documentation and the elements of his own, sufficient for complying with the obligations that derive from the labor relations with his workers".

*[NOTE: Due to the above, we strongly suggest that you company requests from your service provider in order to limit exposure and potential liabilities as a result of the labor reform now in effect, at least the following documents:*

1. *Certified copy of its articles of incorporation and any amendments as well as a certificate of good standing as issued by the competent state authorities*

2. *Certified copies of the Service Provider taxpayer registration number, Social Security Registration as an employer as well as registration with the housing authority and other applicable employer state or federal registrations*

3. *Certified copies of any individual and/or collective labor agreements the Service Provider may have executed with personnel now or previously devoted to your operations and shop rules, in its case. Service Provider to inform us if they will sign contracts as now legally possible according to the new rules, initial period, training, seasonal. Bear in mind that your company might be held jointly liable if the Service Provider does not meet legal requirements. Using the recently allowed term contracts may be advantageous, if applicable.*

4. *Copies of any and all registrations of each and every one of the employees previously and currently provided to your company with the social security, housing authority and any other relevant state or federal agency.*

5. *Copies of all applicable payroll receipts to all employees previously or currently devoted to your operations demonstrating that all payments have been made to them , including but not limited to salaries, overtime, benefits, mandated bonuses and any legal or contractually offered benefits.*

6. *Copy of financial statements duly audited for the last 3 fiscal years as well as income tax returns for the same period.*

7. *Service Provider to be warned that other documentation may be required as a result of the reviewing process.*

*Furthermore, it is recommended that new outsourcing agreements be executed in order to have all corresponding labor reform provisions as concerns new rights and obligations included]*

"**Article 15-C.** The company contracting the services must permanently make sure that the contractor company complies with the applicable provisions in matters of occupational health, safety and environment with respect to the workers of the latter."

The preceding can be complied with through a Unit of Verification duly accredited and approved under the terms of the applicable legal provisions.

"**Article 15-D.** The sub-contracting regime will not be permitted when the workers of the contracting party are deliberately transferred to the sub-contractor for the

purpose of diminishing labor rights; in this case, it will be subject to the provision in article 1004ºC and the following of this Law".

You may see regardless of all the changes, there is only one case in which an actual penalty is to be applied to employers, and that is when they deliberately transfer employees to an outsourcing company to cut down their expenses by, at the same time, cutting back salaries, benefits and so on from the workforce.

## PROFIT SHARING

"Article 117 of the Mexican Federal Labor Law provides that employees have the right to receive part of the profit generated by a company in the percentage determined by the Mexican National Commission for the Participation of Workers in the Profit of Businesses".

Prior to the latest labor reform employers did not face many concerns when dealing with this benefit other than whenever the profit for a particular year was lower that of previous years (particularly the immediately preceding year) which could trigger certain inconformity among employees and even unions. After the reform, we find new rules of the game and one of them is of particular interest since it very likely is part of the government's fight against the abuse of outsourcing practices to lower the income of employees. Such amendment is a subsection of Article 127 of the Mexican Federal Labor Law which reads:

"IV Bis. The workers of the establishment of a company form part of it for the purposes of the participation of the workers in profits."

This few words may open the door for some employees, either individually or collectively, to claim that they have the right to the profits brought in by the core business; i.e. the cafeteria employee or the guard may feel he or she have the right to the same profit brought in by the welder. Due to the novel of this provision, we have yet to see the criteria or Jurisprudence issued by Federal Courts.

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