Unemployment Insurance in an Era of Exceptional Circumstances: Clarifying Chile's Law N° 21.227

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MINUTES ON THE LAW N° 21.227 ALLOWING ACCESS TO UNEMPLOYMENT INSURANCE BENEFITS SET OUT IN THE LAW N° 19.728, UNDER EXCEPTIONAL CIRCUMSTANCES, AND ITS IMPACT ON UNEMPLOYMENT INSURANCE CONTRACTS ASSOCIATED WITH LOANS OF ANY KIND

Background

As a result of the health crisis caused by the global spread of the coronavirus, the Government of Chile has implemented an Emergency Economic Plan to provide support to the most vulnerable workers, businesses and families in order to mitigate the economic impact of this pandemic. Within the framework of this Emergency Plan, the Law N° 21.227 came into force on April 6, 2020. This law allows access to the benefits of the unemployment insurance set out in the Law N° 19.728, under exceptional circumstances.

The purpose of this law is to establish extraordinary and transitory measures to protect employment and income stability, while allowing companies to reduce the costs of those activities that have been totally or partially interrupted and/or affected by the health measures adopted by the authority and maintaining the employment contract with their workers.

Measures considered under the Law N° 21.227

The Law N° 21.227 establishes three transitory measures by virtue of which a worker may have access to the benefits of the unemployment insurance under the Law N° 19.728, chargeable to his individual account and, if the funds in his/her account are insufficient, chargeable to the Solidarity Unemployment Fund:

1. Furlough by an Act of the Authority. This is a temporary suspension of the effects of individual employment contracts when there is an act or declaration by the competent authority establishing health or internal security measures for the control of the disease known as COVID- 19, which involves the interruption of activities in all or part of the country's territory and which prevents or prohibits the rendering of the contracted services.

As a result of the furlough, the worker's obligation to provide services and the employer's obligation to pay remuneration and other allowances that do not constitute a remuneration ceases temporarily. However, the employer must continue to pay social security and health contributions, excluding only those under the law on Occupational Accidents, which will be calculated over 50 percent of the remuneration used as the basis for the calculation of the benefit during the period of suspension of the contract. Furthermore, during this period, workers may not be dismissed unless the grounds of dismissal are "necessities of the company." This situation is provided for under Article 1 of Law N° 21.227.

2. Furlough by Mutual Agreement. This measure also involves a temporary suspension of the effects of employment contracts and operates with respect to those employers whose activity is affected in whole or in part by the COVID- 19 crisis, but is not directly affected by an act or declaration of the governmental authority. It applies to the extent that employer and worker agree to suspend the employment contract.

This suspension agreement has the same effects as the suspension of the contract by an act of an authority as referred to in measure number 1. This situation is provided for under Article 5 of the Law N° 21.227.

3. Agreement of Reduction of the Working Hours. This is the agreement whereby employers and workers affiliated to the unemployment insurance agree to a partial reduction of the working hours, not exceeding 50%, with the worker being entitled to remuneration from the employer equivalent to the reduced percentage and a supplementary payment from the unemployment insurance. It is applicable when the employer is in one of the following situations:

a. VAT taxpayers whose average reduction in sales over a period of 3 consecutive months exceeds 20% in respect of the average sales for the same period of 3 months of the previous business year;

b. Companies in bankruptcy proceedings for reorganization;

c. Companies going through financial advisory procedures due to insolvency; and,

d. Companies, premises or operations that cannot interrupt their activities and need to reduce working hours in order to maintain their operational continuity or to effectively protect the life and health of their workers.

This last ground is set out under Article 7 of the Law N° 21.227.

Linkage of Law N° 21.227 to insurance contracts associated with loans

We have already said that the aim of the law has been to provide protection for employment and to protect the stability of work income for the duration of the furlough or reduction of working hours. The purpose of all this is to enable workers to continue to receive income, or a supplementary income as the case may be, from their individual account and, where the funds in the account are insufficient, from the Solidarity Unemployment Fund. However, and even though this was the main aim of the Law, during its processing, the Chamber of Deputies added an Article 14 to the Bill, which was later included with modifications by the Joint Commission and incorporated as a new Article 21 of the Law, which reads as follows:

> ***Article 21***.- *The workers who make use of the benefits of this law, in accordance with the provisions of Articles 1, 5 and 7, shall be entitled to enforce unemployment insurance or unemployment clauses associated with loans of any nature whatsoever, with banks, financial institutions, department stores and the like, with which they have debts in installments or otherwise. It shall be understood that the worker who takes advantage of the provisions of this law is in a situation of involuntary unemployment for the purposes of coverage of the risks provided for in the respective policy. This provision shall prevail over the provisions of the first paragraph of Article 22 of the law on the Retroactive Effect of Laws.*
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> *The worker must prove his / her condition as beneficiary of this law through a certificate from his employer, which he / she may send preferably electronically to his / her creditor, who must immediately trigger the measures of reduction, postponement or relief of installments or debts established in the respective commercial contract.*

The legislator thus sought to extend the effects of Law N° 21.227 to insurance contracts associated with loans, establishing the right of workers to: *"enforce the unemployment insurance or unemployment clauses associated with loans of any nature whatsoever, with banks, financial institutions, department stores and the like, with which they have debts in installments or otherwise."*

Thus, the new law not only allowed workers who met the requirements to have access to the benefits of the unemployment insurance created by law and mandatory for all those who joined the labor market or restarted their work activities as of October 2, 2002, but who have also become involved in private insurance contracts, assimilating the suspension of the contract by an act of authority, by mutual agreement, and the agreement to reduce the working hours, to the situation of "involuntary unemployment" covered under the insurance contracts in question.

Regrettably, the wording of Article 21 was - in our opinion - not very fortunate and left many grey areas. In this order of ideas, we have no doubt that the terms and conditions of the policies in force regarding waiting periods, deductibles, insured capital, event limits and definitions, minimum active period, years of service and others remain in full force, as well as the general principles of the insurance contract set forth in Articles 512 onward of the Commercial Code.

Analysis of measures set out in the Law N° 21.227 to enforce unemployment insurance associated with loans

On this point, the first thing that should be noted is that the law itself provides that workers who enforce the benefits of this law, in accordance with the provisions of Articles 1, 5 and 7, shall be entitled to enforce the unemployment insurance or clauses associated with **"loans of any nature whatsoever."** Consequently, unemployment policies that are not associated with loans do not enjoy the protection of the law and are not covered. In other words, those unemployment policies that are freely available and that are not aimed at covering all or part of a main loan associated with the Unemployment Policy that the client pays together with the loan are not covered by the provisions of Article 21 of Law N° 21.227.

Secondly, we must focus on the analysis of the third ground that Article 21 of Law N° 21.227 has provided for; i.e., the temporary reduction of the working hours by mutual agreement. Regarding this last situation, we should point out that since it is expressly indicated as a ground in the aforementioned legal provision, the discussion will not focus on whether the coverage applies or not, but rather on the amount that the insurer must pay as compensation. In fact, and only by way of example, we have no doubt that those policies registered as POL 120130976, would enjoy coverage, since said condition does not require the total loss of income by the insured, as a consequence of the involuntary unemployment. But the situation is different in the case of those policies registered as POL 120130378, which state: *"This policy covers events of involuntary unemployment of the worker, which is the one occurring due to circumstances not attributable to the actions of the insured and* ***which implies the total deprivation of income for work related reasons."*** In this way, those claims reported under the grounds of "Reduction of Working Hours" and whose policies are governed by the Policy registered as POL 120130378, would not be covered by the benefits established by the law, since, in the case of the reduction of the working hours, the worker will continue to receive a partial income for the services rendered during the reduced working hours. Thus, the contractual requirement of **total income deprivation** is not met in this case.

Notwithstanding the foregoing, even in case of Agreement on the Reduction of Working Hours that are actually covered, a second analysis should be made, since, when we are faced with situations of partial reductions in income, we will have to determine the respective proportion that such reduction has for the purposes of calculating compensation. All the above is to comply with such basic requirement that our legal system establishes for any compensation to be payable and which is enshrined in Article 550 of the Commercial Code (*"With respect to the Insured, the damage insurance is a contract for compensation only and may never be an opportunity for them to profit or enrich from"*). This is the only way to prevent a situation as regrettable as the one that has led to the enactment of this law from ending up - in practice - generating a profit in favor of the beneficiary who only sees his or her capacity to pay partially diminished. Let us imagine, for example, the case of a worker who has agreed to reduce his / her remuneration by 10% and who has loans that affect his / her gross income by 30% per month; if he / she were to agree to the total compensation established by the Policy, he / she would end up receiving 20% more than he earned before. In the same situation would be those workers to whom their employer promises to compensate the reduction once the emergency situation created by the COVID- 19 has been overcome.

To better round off this analysis, we could point out that retail activities in shopping malls, cinemas, sports shows, restaurants and those businesses that are prevented from operating due to being located in areas subject to prolonged total quarantine will tend to resort to the alternative of Furlough by an Act of the Authority, as referred to in Article 1 of Law N° 21.227. Conversely, business activities that experience a short-term decrease in their operations will probably be covered under the Conventional Reduction in Working Hours. Land and air passenger carriers will be faced with a similar situation, where presumably we will find ourselves using both grounds to regulate the employment contract with its workforce while the pandemic lasts. But where perhaps the greatest risk lies for the Insurance Companies, is in the massive use that the use of the Temporary Suspension of the Work Contract of Article 5 could have, to found claims by the insured to make effective their private unemployment policies, given the rather broad terms in which this cause is written, it may end up acting perfectly as an escape valve to, through it, come to protect most of the labor relations at risk in the country as a consequence of the stagnation of the local economy as a consequence of the ongoing pandemic situation.

Minutes drafted by lawyers Fernando Varas Ramos and Rodrigo Barahona Reyes

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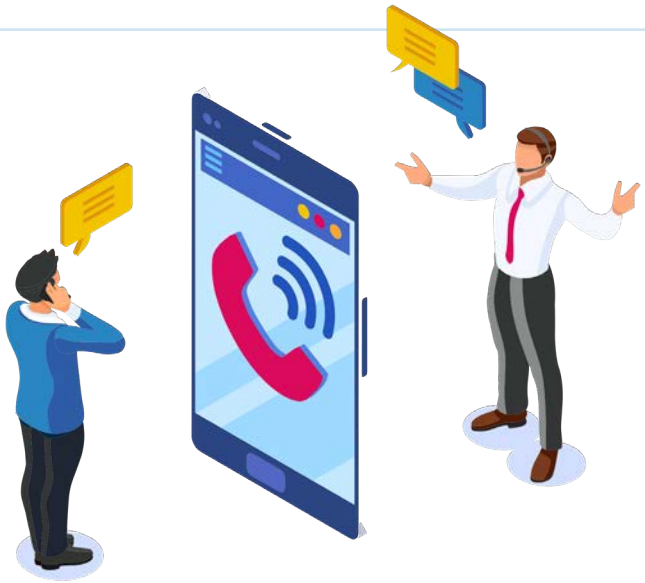
Roberto McQuattie
Vice President, Regional Head
Crawford Latin America
P +1-305-371-5572 M +1-786-390-8572
roberto_mcquattie@us.crawco.com
201 S. Biscayne Blvd, Suite 2856,
Miami, FL 33131

Javier Carvallo P.
President, Crawford Chile
P (56-2) 2676-9320
JCarvallo@crawford.cl
Coyancura 2283, Piso 9º
Santiago - CHILE - CP 7510151

Fernando Varas Ramos
Sub-Gerente General, Crawford Affinity
P (+56 2) 22-471 7000
fvaras@crawfordaffinity.com
Monseñor Sotero Sanz 55, piso 2.
Providencia, Santiago - CHILE - CP.: 7500007



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