

# Outsourcing

*Contributing editor*  
Mark Lewis



2016

GETTING THE  
DEAL THROUGH

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# Outsourcing 2016

*Contributing editor*

**Mark Lewis**

**Berwin Leighton Paisner LLP**

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# Mexico

Rodolfo Trampe and Jorge Díaz

Von Wobeser y Sierra, SC

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## Market overview

### 1 What kinds of outsourcing take place in your jurisdiction?

In Mexico, a subcontracting regime (understood as the regime through which an employer as contractor executes works or provides services with its workers who are dependent upon it, to a beneficiary, individual or entity, which establishes the work of the contractor and supervises it in the performance of the services or execution of the works contracted) has been generally associated with outsourcing and with all forms of subcontracting or provision of services and works between companies of the same business group.

With the above in mind, it should be taken into account that there are different types of outsourcing, according to which the company providing the services is limited to providing exclusively personnel services (human resources outsourcing (HRO)), or it is responsible for satisfying the information technology needs of a client (information technology outsourcing (ITO)) or for one or more operational processes of the client (business process outsourcing (BPO)), such as specialised services like marketing, security, cleaning, office maintenance, etc.

Therefore, it can be concluded that in Mexico outsourcing is very common and there are all types of outsourcing, but it is essential to distinguish between real outsourcing such as ITO, BPO, property management outsourcing, facilities management outsourcing, and general business services outsourcing and the simple provision of personnel services (HRO) due to the different legal implications and liabilities for the contractor of such outsourcing services.

### 2 Describe the recent history of outsourcing in your jurisdiction. How well established is outsourcing? What is the size of the outsourcing market in your jurisdiction?

As in many other countries, in Mexico, outsourcing began to become important after the Second World War when companies, as a result of technological advances, specialisation in services and other factors, noticed that their competitiveness was diminishing since it was practically impossible for each department inside the company to stay up to date. On the other hand, independent specialised companies did not suffer from the effects of technological advances since they could focus on their own specialisation and thereby stay at the forefront and remain competitive.

Thus outsourcing (without including HRO) keeps growing and specialised services continue to have a greater and greater relevance in both the private sector and in the government. In fact, today there are few companies that do not make use of some kind of outsourcing.

HRO (understood as the simple provision of personnel services) began to grow more than 35 years ago and today approximately 60 to 70 per cent of the Mexican workforce operates through a subcontracting regime.

Outsourcing is well established in Mexico; however, many abuses have been committed in recent years through subcontracting, attempting to eliminate or reduce labour rights (principally benefits) and to entirely or partially evade the payment of contributions to social security. In order to combat these abuses, the Congress of the Union introduced a series of limitations on subcontracting through amendments to the Social Security Law (the reform of article 15-A of July 2009), the Federal Labour Law's reform (November 2012), as well as the recent (June 2015) amendments to the National Workers Housing Fund Institute Law (article 29-bis).

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## Policy

### 3 Has the government of your jurisdiction adopted policies to encourage the development of the jurisdiction as an outsourcing centre, either for the domestic market or to provide outsourcing services to foreign customers?

The government has no official written policy in regard to outsourcing. Nevertheless, concerning the subcontracting regime (HRO understood as the simple provision of personnel services) it is well known that the government prefers employers that hire employees directly rather than subcontracting them under HRO. This is because over the years this type of outsourcing has represented an abuse (by some companies) to avoid their responsibilities.

Due to the way in which the concept of HRO was embodied in the new provisions of the Federal Labour Law, these provisions have caused concern among the business and legal sectors because the regulation introduced is not completely clear or specific about how it should be applied.

### 4 Are there in your jurisdiction any fiscal or customs incentives, development grants or other government incentives to promote outsourcing operations within your jurisdiction?

There are no fiscal or custom incentives that promote outsourcing operations.

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## Legislation and regulation

### 5 Is outsourcing as a commercial or operational concept specifically recognised and provided for in your legal system? How?

Outsourcing is a commercial or operational concept specifically recognised and provided for in the legal system. It is recognised as a contract (service agreement or professional service agreement) that is generally regulated in the Civil Code and depending on the purpose of the contract and the parties involved, it can also be regulated by other provisions or codes, such as the Commerce Code, the Federal Labour Law, bank regulations, environmental regulations, governmental codes or regulations, which, in general terms, can limit the outsourcing (understood as providing services). This means they can exclude certain matters that cannot be outsourced and impose special obligations on the contracts entered into.

In other words, in Mexico, the law does not regulate the outsourcing contract as such, rather, in general terms, outsourcing is carried out through services agreements. In this regard, article 2,606 of the Federal Civil Code establishes that 'the person providing and the person receiving professional services can agree on the appropriate compensation for them'.

In this regard, article 77 of the Commercial Code establishes that 'illicit agreements do not produce any obligation or claim, even when they govern commercial transactions'. Further, article 78 of the Code establishes 'in commercial agreements each party is bound in the manner and terms it appears that party wished to be bound, and the validity of the commercial act does not depend on the observance of specific formalities or requirements'. Finally, article 75 of the Code establishes that it considers that acts of commerce, which are governed by the Commercial Code and the Civil Code is secondary.

Further, and as previously mentioned (see question 1), it is important to point out the different types of outsourcing (due to the fact that in Mexico a subcontracting regime has been generally associated with outsourcing

and all forms of subcontracting or provision of services). The first one is a company providing personnel services (HRO) and the second is a company providing services to satisfy the information technology needs of a client (ITO), or for one or more operational processes of the client (BPO), such as specialised services like marketing, security, cleaning, office maintenance, etc.

The most common use of the word 'outsourcing' in Mexico is when subcontracting employees (subcontracting regime) by executing a service agreement between any company (customer) and the supplier (outsourcing company) with the purpose of not hiring the employees directly, with the aim of trying to control and reduce contingences and liabilities. In this regard, the subcontracting regime applies to a situation in which the two elements of a work relationship (provision of personal subordinated work and economic remuneration) are divided, such that a worker provides his or her subordinated services to a person other than the one that pays his or her salary and benefits.

Article 15-A of the Federal Labour Law defines the subcontracting regime as the regime through which 'an employer, called a contractor, executes works or provides services with its workers who are dependent on it, to a beneficiary, individual or entity, which establishes the work of the contractor and supervises it in the performance of the services or execution of the works contracted'.

According to this definition, for a services relationship to be considered as subcontracting, there must be three elements present:

- that the contractor executes works or provides services with workers dependent on it, that is, that they receive their salary from the contractor;
- that the beneficiary establishes the work of the contractor; and
- that the beneficiary supervises the performance of the services or execution of the contracted work.

Strictly speaking, if any of these elements are missing, subcontracting does not exist.

## **6 Is there any legislation or regulation that directly prohibits, restricts or otherwise governs outsourcing, whether in (onshore) or outside (offshore) your jurisdiction?**

As previously mentioned, depending on the purpose of the contract and the parties involved, different regulations, prohibitions and restrictions apply to governing outsourcing in general.

The topic is so broad that it would be impossible to outline the different restrictions or prohibitions. However, generally speaking, it can be stated that most restrictions, prohibitions and special regulations are for government companies that wish to contract outsourcing services (regardless of the kind of outsourcing) and similarly there are innumerable limitations, restrictions and prohibitions on private companies related to financial activities, private companies that offer health services (such as hospitals), telecommunications companies and, in general, all those private companies whose users are the public.

The laws regulating, prohibiting and governing outsourcing and the contracting of outsourcing companies are contained in the Federal Constitution, the Federal Laws, local laws and regulations and numerous circulars or internal rules of a particular industry.

## **7 What are the consequences for breach of the laws directly restricting outsourcing?**

It depends on each restriction since each rule can establish a different consequence from invalidating a contract to commission of a crime, imposition of fines or joint or secondary liability of the customer of the outsourcing company (eg, when a subcontracting regime exists (HRO), the Federal Labour Law establishes three main requirements that must be met, in the understanding that if any of them are not met, the company benefiting from the services will be considered the employer for all legal effects, including social security obligations).

## **8 Describe any sector-specific legislation or regulation that applies to outsourcing operations.**

All financial entities have special regulations that govern the contracting of outsourcing (regardless of the kind).

## **9 How does competition regulation apply to outsourcing contracts or structures?**

There are no additional restrictions regarding competition regulations that apply to outsourcing contracts or structures than those applicable to any other structure. Regarding outsourcing contracts, the parties can agree that the company that uses personnel through outsourcing cannot offer or hire the said personnel during the term of the agreement and for an additional period after its termination. In addition, it can also be agreed that the outsourced personnel cannot be hired by competitors of the company using the said personnel after the termination of their employment with the company.

However, in order to avoid any possible competition risks, and according to the competition authorities' current criteria, the maximum term after the termination of the agreement in which the non-compete restriction can be enforced is five years after the termination of the relationship with the employed outsourced personnel.

## **10 Are there any draft laws or legislative initiatives specific to outsourcing that are being developed or are contemplated?**

At present, there is a bill being discussed in the Mexican Congress that would provide that for social security purposes salaries should be considered in the same way as under the Income Tax Law. If approved, this bill will result in an increase in the cost of the social security rates, which will also affect outsourcing transactions (HRO), since the outsourcing company charges the social security contributions to the final customer. However, given that more than two years have passed and it still has not been approved, it is likely that the bill will be rejected.

The Social Security Institute has recently issued some criteria intending to set rates. If the social security institute applies its criteria, taxpayers could challenge these as the Social Security Institute is not a legislative authority.

## **Contractual considerations**

### **11 What are the typical corporate or quasi-corporate structures or vehicles used to create outsourcing arrangements?**

In Mexico, there are several corporate or quasi-corporate structures or vehicles that are used to create outsourcing arrangements, depending on the needs of each company and, mainly, depending on the particular regulations that apply to some industries and companies. However, one of the most common structures is through 'virtual captives'.

Further, in several structures the client (contractor) transfers the assets, leases part of its facilities and transfers its own personnel.

### **12 What forms of outsourcing contract are usually adopted in your jurisdiction?**

In general terms, outsourcing is carried out through services agreements. Further, sell and lease back agreements are also a common way of outsourcing contracts.

It should be noted that in Mexico there are several corporate or quasi-corporate structures or vehicles used to create outsourcing arrangements and, therefore, there are several ways to arrange an outsourcing relationship; however, the most common way is through service agreements.

### **13 Outline the contractual approaches that are adopted in your jurisdiction to address regulations affecting outsourcing.**

As previously mentioned, outsourcing contracts, pursuant to Mexican law, may be considered as civil contracts or commercial contracts. If they are civil contracts, the body of law that regulates them is the Federal Civil Code and, mainly, the local civil codes. On the other hand, commercial contracts are regulated by the Commercial Code, and by the Federal Civil Code secondarily. General principles for contracts in the Federal Civil Code are, for instance, that there is no mandatory form, unless specifically stated otherwise, and that, for its interpretation, the will of the parties shall always be respected and pursued. However, should any doubts exist, subjective, objective, systematic, and contract-salvaging principles are established in the Federal Civil Code. These principles would also be applicable to commercial contracts.

Depending on the subject matter and the parties, many different laws, regulations, by-laws and other similar rules may be applicable. For

instance, in many cases, outsourcing contracts may be subject to Mexican official standards (quality standards for goods and services). Also, in certain specific cases (such as banking services) many government agencies may issue regulations to guide the provision of services and protect clients in relation to corporations.

Due to the fact that there are no remedies in Mexican law, the penalties for a breach would have to be measured with different standards. For services rendered, the test is to determine the quality of the services, taking into consideration the results. Should the quality be below what is foreseen in the agreement, penalties may be issued against the provider.

Mexican law permits the establishment of the jurisdiction and alternative methods for dispute resolution, where applicable. Further, service agreements usually contain confidentiality clauses, data protection clauses, termination rights, suitable liability provisions, etc.

## Data protection

### 14 Identify the principal data protection legislation applicable to outsourcing operations.

In Mexico, the main data protection legislation applicable is the Federal Law for the Protection of Personal Data in Possession of Private Companies or Individuals and its Regulations.

### 15 How do rules on the ownership, location, processing and distribution of data apply to outsourcing in your jurisdiction?

Mexican data protection laws require all entities to have a privacy notice signed by all their employees for the use of their personal information. The scope of this information, as well as its uses and possible transfers, needs to be included in the privacy notice. In addition, in the event the company requests sensitive information (eg, medical history, affiliations, sexual preference and religion), the person handing over his or her information must expressly agree to its use and transfer.

The law states that transfer of personal data is possible among companies of the same corporate group without the owner's prior consent. This will not apply where a company hires personnel for outsourcing activities, since the outsourcing company (who is the employer of the outsourced personnel) will not be part of the corporate group of the companies requesting the outsourcing services. Therefore, where any transfer of personal data from the outsourced personnel is required, the outsourced personnel will have to grant their consent to such a transfer.

Data protection legislation in Mexico relies on each company having its own protection standards for the security of the information requested. Companies do not have any minimum standards to comply with, as long as they guarantee the due protection of the information delivered to them. However, if any transfer of personal data is necessary, the company receiving the personal data must ensure that it meets the same security standards as the company in charge of protecting the personal data.

## Labour and employment

### 16 What is the relevant labour and employment legislation for outsourcing transactions?

The 2012 reform to the Federal Labour Law specifically regulates outsourcing (subcontracting: exclusively personnel services) due to the many abuses that have been committed in recent years through subcontracting, attempting to eliminate or reduce labour rights (principally benefits) and to entirely or partially evade the payment of social security contributions.

The reform defines (article 15-A) the subcontracting regime as the regime through which an employer called the contractor executes works or provides services with its workers who are dependent on it, to a beneficiary, individual or entity, which establishes the work of the contractor and supervises it in the performance of the services or execution of the works contracted.

The same article states that any work or services performed under an outsourcing scheme (as defined above) must fulfil certain requirements:

- it cannot cover all of the activities, the same or similar in their entirety, that are performed in the workplace;
- it must be justified by its specialised nature; and
- it may not include work the same as or similar to the work done by the rest of the workers hired by the beneficiary.

Additionally, article 15-B indicates that the contract through which the contractor and the other contracting party agree on the works or services to be

performed must be in writing and the company receiving the services must ensure that the company providing the services, for example, the outsourcing company, complies with its obligations derived from the employment relationship with its employees.

Last, article 15-C stipulates a further requirement as it indicates that the company receiving the services must ensure, on a permanent basis, that the outsourcing company complies with all labour law provisions regarding security, health and environment.

Regardless of the above, the outsourcing companies (all kinds of outsourcing) have the same legal labour obligations as any other company legally incorporated in Mexico.

### 17 In the context of an outsourcing, how does labour and employment law apply to a change in initial or subsequent service providers, or transfers of undertakings or parts of undertakings?

There is nothing specific in this respect and it should always be understood that the outsourcing company is responsible for its labour obligations to its own workers, and that the company that contracts such outsourcing services is responsible for the obligations to its workers.

In this regard, in the event of a change in initial or subsequent service providers, or transfers of undertakings or parts of undertakings, each party is responsible for its obligations to its workers (eg, when a company that hires an outsourcing company terminates the service agreement, the outsourcing company will be responsible for its own employees and its employer-employee obligations).

### 18 Are there any requirements to consult or negotiate with organised labour, works councils or employees regarding an outsourcing?

There is no legal requirement; rather, it depends on what is stipulated in the collective bargaining agreement, if there is one. In other words, there are collective bargaining agreements that expressly state that the company cannot outsource certain services.

Regardless of the above, from a practical point of view it is advisable to consult with the union, if any, when a company is planning to modify its scheme to an outsourcing scheme, in order to get the union's support.

### 19 Are there any notification or approval requirements that apply to an outsourcing transaction?

According to the Social Security Law, it is established that the contractors (only in the case of personnel service according to the definition of subcontracting) must provide the following information quarterly to the sub-delegation corresponding to the domicile of the employer or bound party and of the beneficiary within the first 15 days of the months of January, April, July and October in relation to the contracts executed in the quarter in question:

- information regarding the parties to the contract (such as name, type of entity, corporate purpose, domicile, taxpayers registry number and employer registration number before the Mexican Social Security Institute (IMSS)); and
- information regarding the contract (such as purpose, term, profiles, positions indicating whether it is operational, management or professional personnel and the estimated monthly number of workers or other subjects of insurance that will be made available to the beneficiary of the services or work contracted).

The employer (outsourcing company) will include for each of its workers the name of the beneficiary of the services or work contracted in the computer system authorised by the IMSS.

Such information and documentation shall be provided to the IMSS in a printed document or in media that is magnetic, digital, electronic, optic, magnetic-optic or of any other nature, as set forth in this Law and its regulations.

Moreover, according to the recent amendment to the National Workers Housing Fund Institute Law, contractors have similar obligations to those provided by the Social Security Law.

**20 What are the legal implications, including penalties, for non-compliance with the labour and employment rules and procedures?**

In labour matters there are three types of liabilities: joint and several liability, secondary liability and employer liability. These liabilities are apart from the fines that the labour authority might apply for non-compliance.

The concepts of 'joint and several liability' and 'secondary liability', established in the Federal Labour Law and in the Social Security Law (as of the reform of article 15-A of the Social Security Law of July 2009), respectively, were already provided for, both in the concept of the beneficiaries of the services provided and in the intermediaries. The recent amendment to the National Workers Housing Fund Institute Law also provides for secondary liability.

Thus, the Federal Labour Law indicates that both the beneficiary company and the intermediary would be considered jointly liable for the employment of the worker, provided that the true employer or intermediary company does not have sufficient resources of its own to meet its labour obligations. In addition, the Social Security Law indicates that in the case of the provision of personnel services, the beneficiary of the services will be liable when the true employer fails to meet its obligations, provided the IMSS has notified the true employer in advance of the corresponding requirement and the latter has not responded.

In this regard, with the reforms to the Federal Labour Law the companies benefiting from the subcontracted services will become jointly and severally or secondarily liable to being considered the employers when the requirements indicated in article 15-A of the Federal Labour Law are not met (employer liability).

**21 What are the key immigration and visa requirements for employees of customers or providers entering your jurisdiction to manage outsourced operations or to receive or provide training?**

For any foreign nationals to legally provide their services in Mexico, they must have a visa, regardless of the company (whether or not it is an outsourcing company) and in general terms they have the same rights and obligations as a national employee. However, the Federal Labour Law establishes that most of the workers (90 per cent) within a company must be nationals and some positions, such as company doctors, must be nationals. Moreover, positions such as specialised or high-level positions are exempt from this foreign percentage cap.

**Taxation**

**22 Outline the taxation rules that apply to the establishment and operation of outsourcing captives or similar establishments in your jurisdiction.**

There are numerous taxation rules when dealing with subsidiaries resident in Mexico for tax purposes. First, if the transactions are to be executed

between related parties, a situation that occurs when these subsidiaries provide services to companies of the same group residing abroad, requirements set forth in the Income Tax Law must be complied with.

Such requirements consist of being obligated to determine their taxable revenues and authorised deductions by considering the prices and amounts of compensation that would have been used by or between independent parties in comparable operations. This analysis should be performed by one of the methods described in the Income Tax Law as well as supported with specific documents described therein.

Additionally, the corresponding income derived from the rendering of the services must be accrued for tax purposes and monthly and yearly payments must also be paid together with the filing of tax returns.

In respect of certain services, according to the Value Added Tax Law, it is considered that those rendered by Mexican entities to residents abroad are taxable. Exceptions exist in order to consider those services taxed at a zero per cent rate.

**23 Outline the indirect taxes in your jurisdiction that apply to the import of offshore outsourcing services by companies within your jurisdiction.**

When services are rendered by residents abroad to residents in Mexico for tax purposes such entities are obliged to regularly withhold and pay the corresponding income tax to the tax authorities. Rates may vary depending on the specific kind of service rendered and if a tax treaty to avoid double taxation, by which the tax rates are diminished, is applicable.

According to the Value Added Tax Law the use in national territory of independent services is taxable when rendered by persons who do not reside in Mexico. Nevertheless it should be noted that due to the regulations of the law such tax is also creditable, resulting in no economic effect on the parties involved in the transaction.

**Current issues**

**24 Identify and give details of any notable cases or administrative or regulatory determinations within the past three years in your jurisdiction that have directly involved outsourcing.**

It should be emphasised that the reform to the Federal Labour Law does not provide much detail in respect of subcontracting and its consequences. Although subcontracting is regulated generally and it is provided that in some cases the contracting company and beneficiary of the services will be considered the employer, the articles related to this topic will have to be interpreted and applied by the judicial authorities (conciliation and arbitration boards and federal courts) and administrative authorities.

Another example linked with outsourcing is the court precedent issued in 2012 in respect of the 'economic unit' being understood as a single 'employer' regardless of the different legal entities it includes, which is precisely what has generated concern and questions the advisability of continuing to subcontract personnel, whether through outsourcing,



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through the creation of internal service providing (that is, affiliated with the beneficiary of the services) and of manufacturing operations in a free trade zone, among others.

This is because the concepts of joint and secondary liability are not new from the labour point of view. However, the concept of 'employer liability' has caused controversy since the principal risk lies in the fact that if the labour authority considers both companies as the same economic unit and therefore as a 'single employer' or if the legal requirements corresponding to subcontracting are not met, the worker would be entitled, in principle, to demand from both companies the payment of profit sharing, which of course defeats the purpose or primary advantage of business schemes in Mexico.

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**25 What are the main challenges facing outsourcing within, from or to your jurisdiction?**

In general terms, outsourcing is acceptable from all perspectives, with the limitations imposed by certain industries. However, regarding the subcontracting regime (HRO) and due to the many abuses that have been committed in recent years, at present there is political and social pressure to eradicate outsourcing companies that avoid obligations or those companies that subcontract services or transfer their personnel to a services company in order to diminish labour rights.

As a matter of fact, tax authorities are questioning how entities with no employees on their payrolls are able to obtain significant amounts of income, and they are suggesting that it should be assumed that all entities require employees in order to generate income. Although there is no existing legal provision to support this assertion, it is necessary to be aware of such positions and practices of the authorities.

## Getting the Deal Through

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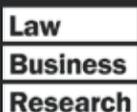
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