

# COVID-19 and Labour Law: Chile

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## Abstract

Among the measures that have been adopted by the Chilean government to tackle the COVID-19 pandemic stands out the declaration of State of Catastrophe, the promulgation of certain laws that regulate remote work, access to benefits of the unemployment insurance and the employment subsidy, among others. Likewise, the administrative bodies have made statements regarding measures to be adopted. Despite the measures that have already been adopted, workers are still in need of further protection.

**Keywords:** Covid-19; Labour Law; State of Catastrophe; Remote work; Unemployment benefits and subsidy.

## 1. Introduction

The COVID-19 pandemic has affected the Latin-American region in a more belated manner. Considering that its effects are in full development, and as it has occurred worldwide, there is no certainty yet as to when the situation will stabilize.

The first case of infection in Chile dates to March 3<sup>rd</sup>, 2020. Since then to date<sup>1</sup>, 5.972 infections have been reported and 57 persons have died due to this virus. These figures led to the adoption of a series of measures, which to the date of this paper remain in force.

The general measures adopted will be presented first, and then we will refer to specific measures on labour matters that have been adopted by the Chilean government and that have consequences on the labour market. It must be stated that a selection of the topics, laws and decrees has been made, since their quantity exceeds the extension assigned to this paper.

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<sup>1</sup> This report was issued on April 9, 2020, considering the information collected until 9 PM on April 8.

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## 2. General Framework.

Regarding the general measures, the most important one was adopted on March 12, 2020, and it consists of a decree issued by the President of the Republic, the Executive Order N°104, by which it is declared a “State of Constitutional Exception of Catastrophe”. This constitutional mechanism<sup>2</sup> grants the President extraordinary powers, as well as the possibility of restricting a set of liberties and rights of the Chilean citizens.

This decree has granted legal authorization for the government, through the Ministry of Health, to establish a set of relatively novel measures in the national legal context, such as curfew, the isolation of the entire national population during certain time ranges and in specific geographical areas, the existence of a sanitary cordon or a quarantine lines and sanitary customs, the prohibition to develop certain economic activities, among many other measures of varying intensity<sup>3</sup>.

As in other countries, the measures are aimed at halting the exponential spread of the virus and they entail side effects, such as the alteration of the normal functioning of the national economy. These side effects have initiated a debate regarding the different legal tools that allow to reconcile the health of the population with a potential loss of jobs and an economic crisis<sup>4</sup>.

## 2. Specific measures taken at this stage.

### 2.1. Effects of interruption of business operations on employment.

In relation to the regulation of labour law, the Government has aimed to prevent the loss of jobs through the publication, on April 6, 2020, of Law No. 21.227<sup>5</sup>. This law establishes

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<sup>2</sup> This executive order declares the “State of Constitutional Exception of Catastrophe”, recognized in article 41 of the Political Constitution of the Republic and in Law N°18.415. This mechanism operates in case of a state of Public Calamity, such as the spread of Covid-19.

Public calamity is understood as "situations, of a human or natural cause, of a magnitude such that they generate serious damage to the normal development of social life and the economy, significantly affecting people or property within the territory of the Republic" (García Pino G., Contreras Vásquez P., *Diccionario Constitucional Chileno*, in *Cuadernos del Tribunal Constitucional*, No. 55, 2014, p. 444).

<sup>3</sup> Exempt Resolution No. 208 of the Ministry of Health, dated March 25, 2020, has been one of the most relevant orders issued to date due to the intensity of its measures.

<sup>4</sup> In this context, on April 8 of this year, the Ministry of Finance issued the Exempt Resolution No. 88, in order to provide a record regarding the working population that has not been able to carry out its functions by an act of authority. Thus, it acknowledges that between 10:00 PM and 05:00 AM the entire national population has been prevented from performing their work due to the curfew. In addition, it also states that, taking into consideration a geographical perspective, 20 communes are subject to a total quarantine; in consequence, their population must be considered as prevented from working. Lastly, it points out that there is a total of 10 business activities that, due to the characteristics of their service, have been prevented to perform their work.

<sup>5</sup> The preamble of Law No. 21.227 states that “[t]he measures that can be adopted within a state of constitutional exception and health alert will affect the normal functioning of the country, especially economic activity. The aforementioned implies suspending work activities, which requires the adoption of special rules to protect job stability and guarantee income for workers, in order to maintain our country sustainable for the

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various mechanisms that seek to provide alternatives to the termination of the employment relationship. The first of these is the suspension *ipso jure* of the employment contract provided that a declaration of authority in this regard is issued, which must be based on sanitary measures. The suspension of the employment contract implies that neither party must fulfil their labour obligations (provide a service/pay a remuneration); however, the worker may obtain a replacement income from the funds saved in the individual account of his/her unemployment insurance<sup>6</sup>. The second mechanism consists in the suspension of the employment contract by mutual agreement. For this purpose, the will of the employer and the will of the worker or the trade union must concur. It should be stated that this option produces the same legal effects as the previous mechanism. A third alternative is for the worker and the employer<sup>7</sup> to agree on a reduction of the ordinary workday by up to 50%. In this case, the employer will only pay a remuneration proportional to the time worked and the worker will be able to compensate part of the reduction of the remuneration with his/her funds saved in the personal account of unemployment insurance. It should be noted that this modality is limited by the time factor and it can be subscribed by employers who fulfil certain requirements.

Another measure that affects the labour market is the issuance of Law 21.218, published on April 3 of 2020 (which will be in force after 30 days), establishing a subsidy to obtain a guaranteed minimum income. This subsidy will have a monthly nature and it will be funded by taxes. Although this law had been adopted for a limited time, its final approval and publication coincides with the need for such a measure at this time. In this law it is stated that the dependent workers, under a current employment contract, that are subject to an ordinary work time for greater than 30 hours per week will be beneficiaries to the subsidy. The requirements to be entitled to this benefit are i) to receive a gross monthly salary of less than \$ 384.363 and ii) to integrate a household belonging to the first nine deciles. The amount of the subsidy will depend on the gross monthly salary of the worker and the number of hours of his/her ordinary work time. It should be noted that this subsidy will not be part of the basis for calculating social security contributions, taxable, embargoed, nor will be subject to any discount. In addition, it is stated that the workers will continue to receive the subsidy during the periods in which they make use of the annual leave, medical leave or postnatal parental leave. Furthermore, a series of restrictions are established: i) the fact of being entitled to this subsidy cannot entails an unjustified reduction of the gross monthly salary or of any of its components, agreed in the employment contract, in comparison to the amount paid by the employer in the previous three months; ii) the employer cannot terminate the

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task of recovery after the present crisis” (Mensaje N° 020-368, Boletín N°13.352-13, p.4, for further information: <https://bit.ly/3aMSKkd>).

<sup>6</sup> This option has been subject to criticism, mainly due to the fact that it is the worker who is in charge of his/her maintenance during the crisis. Furthermore, only since October 2nd, 2002, the affiliation to the unemployment insurance is mandatory; in consequence, this measure will not benefit the entire spectrum of workers. In addition, it has been criticized that the same replacement rate is set for a worker unable to provide the service as for a dismissed beneficiary, due to the fact that the foundation for the decrease in the replacement rate is not present in this case.

<sup>7</sup> In this case, the trade union must be consulted beforehand (provided that it exists at a company level). However, the union's position is merely advisory, since the legislation does not grant it binding powers regarding the worker's opinion.

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employment contract and subscribe a new one, in which a lower remuneration is agreed, with the sole purpose that the worker may be entitled for the subsidy; iii) the salary of the workers receiving the subsidy cannot be established in relation to the amount of the subsidy, but only based on objective considerations. Additionally, this law states that the employer is obliged to report the existence of this subsidy to all workers who have a gross monthly salary that entitles them to the subsidy. In order to access this subsidy, workers must submit an application directly to the Ministry of Social Development and Family or through the Institute of Social Welfare. Finally, it is established that the values established in pesos will be readjusted on March 1st of each year according to the variation in GDP and that this subsidy will be in force until December 31, 2023.

## 2.2 Health and safety of workers.

The Chilean government has not adopted specific legal measures on occupational safety and health. However, a series of secondary regulations have been issued by the administration, as described below. On the contrary, general legal measures have been adopted to facilitate arrangements in the workplace, which do not have a temporary nature and are allowed to be adopted even after a crisis. On March 26 of 2020, Law No. 21.220 was published, which modifies the Labour Code, incorporating a chapter on remote work and teleworking, effective as of April 1st, 2020. This type of work is the one in which the worker provides his/her services, totally or partially, from his/her domicile or another place or places different from the establishments, facilities or workplace of the company or the one in which the services are provided through the use of technological, computer or telecommunications means or in case such services must be reported through these means. This law states that the parties of the employment contract may agree on the modality of remote or teleworking, either at the beginning or during the employment relationship.

In addition, the Internal Revenue Service has proposed<sup>8</sup> to consider as deductible all the expenses that a company may eventually assume to prevent and protect the health of its workers provided that they are linked to the spread of COVID-19. Thus, for instance, the purchase of gel, face masks, disinfectants, authorization for remote work are expenses that may be deducted from the company's income declaration.

Likewise, the Labour Directorate has made statements that seek to specify various rules regarding occupational safety in relation to the spread of COVID-19<sup>9</sup>. In this sense, this organism has emphasized on the employer's obligation to implement the measures ordered by the health authority, as well as to carry out information activities within the premises of the company<sup>10</sup>. Additionally, this body has proposed alternative measures for the provision

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<sup>8</sup> This proposal is made as a Public Consultation until April 15 of this year under the title "Gastos y Donaciones por Brote Mundial del Coronavirus" I.D.1149. For further information: <https://bit.ly/2yCo4nH>.

<sup>9</sup> In this sense, Ordinary Opinions No. 1116/004, No. 1239/005 and No. 1283/006 stand out.

<sup>10</sup> It must be noted that the Labour Directorate has stated on multiple occasions that the employer is liable for the slightest fault (*culpa levisima*) regarding the health problems that workers may suffer (Ordinance Order 4870/281).

of the services, which allow to guarantee the health of the dependents, such as: i) remote working; ii) entering into agreements on deferred hours of entry and exit of workers, iii) granting of collective leaves days, iv) anticipating the annual leave days, v) shift work.

Furthermore, the Office of Comptroller General of the Republic has also established guidelines on this matter in relation to public servants. This organism has stated that the Head of the respective civil service must adopt measures in order to ensure the health of the civil servants. Among the proposed measures must be highlighted the implementation of remote work and the declaration that workers who do not perform essential functions may be absent<sup>11</sup>.

In consequence, it is possible to verify that the measures proposed to tackle the crisis aim at avoiding the attendance of the worker to the workplace but seeking to maintain the provision of the service by means of an incentive, mainly through administrative regulations of the figure of teleworking, which has been reinforced with the entry into force of Law No. 21.220.

### **2.3 Increase caregiving duties due to school closures or daycare services stoppages.**

The Government has not adopted measures in this regard. However, an attempt has been made in order to fill this deficiency through a partial operation of the educational establishments. These establishments remain functioning to continue to comply with the School Feeding Program<sup>12</sup> and to fulfil their duty of care with respect to those students who voluntarily attend the establishment. It should be noted that the establishments are not allowed to deny the students the entrance and permanence in the educational establishment<sup>13</sup>.

### **2.4 Particularly vulnerable workers.**

No action has yet been taken in relation to most vulnerable groups of workers. Notwithstanding, it has been established that domestic workers who work in a territory under compulsory quarantine may stay at their own homes or at the employer's household during the quarantine, but this measure shall be adopted with the agreement of the employer. In relation to other groups of atypical workers, it has been subject to debate the establishment of measures in their favour, particularly towards independent and informal workers.

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<sup>11</sup> Opinion 3610 dated March 17 of 2020, issued by the Office of the Comptroller General of the Republic.

<sup>12</sup> This program provides a daily food service to vulnerable students in educational establishments, which since the suspension of classes, as a result of the spread of COVID-19, has consisted in the delivery of baskets with food supplies.

<sup>13</sup> This have been stated by the Superintendence of Education (Resolution No. 0540 dated March 17, 2020).

### 3. The role played by Social Partners

The Central Unitaria de Trabajadores (CUT) has also attempted to influence the public debate<sup>14</sup>. In addition, it has declared its disagreement with Law No. 21.227, due to the fact that it considers that this is a mechanism that aims for the worker himself/herself to assume economically the health crisis<sup>15</sup>.

In turn, Law 20.940 created the Superior Labour Council, a tripartite instance in which all the initiatives that affect workers' rights must be discussed<sup>16</sup>. This body met on March 18 of the current year in order to discuss the most suitable measures to guarantee the protection of workers.

### 4. Issues still to be resolved.

The main legal debate in labour matters is regarding whether the measures of paralysis adopted by the authority should be deemed as force majeure that justifies the cessation of the reciprocal obligations of the parties (provision of services/payment of remuneration).

It should be highlighted that the national legal community have adopted two positions regarding the aforementioned debate. The first position may be noted in the opinions of the Labour Directorate<sup>17</sup> and in Law No. 21.227 which proposes the suspension of employment contracts and, consequently, the release of the reciprocal obligations of the parties. On the contrary, the Office of the Comptroller General of the Republic has stated that, regardless of the existence of a force majeure, the State Administration must continue paying for the permanent services of its providers, even if these services are not provided, since it exists an impossibility to provide those services. The only condition is for them to prove the continued fulfilment of their labour and social security obligations<sup>18</sup>.

This disparity of criteria will result in the existence of workers who will obtain their remuneration, given the fact that their employers have subscribed contracts with the State Administration, as opposed to other workers whose employment relations will be suspended due to the sole fact that their employers do not maintain such relations with the State.

Finally, another issue left vacant is that it has not been established any incentives for health workers nor measures have been adopted in order to ensure their provision of services, taking into consideration the conditions of psychological stress and permanent

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<sup>14</sup> On March 17, this body submitted to the governmental authorities the “Plan Nacional de Emergencia COVID-19”, proposing measures aimed at protecting the employment and health of workers.

<sup>15</sup> For further information: <https://bit.ly/39PkELn>.

<sup>16</sup> The International Labour Organization has stated that this type of structure is an ideal mechanism for an adequate institutionalized social dialogue in a context of crisis such as the current pandemic. For further information: <https://bit.ly/3e6bg9x> (Opinion column by Fabio Bertranou “COVID-19: proteger el empleo, reforzar la protección social, fortalecer el diálogo social”).

<sup>17</sup> Opinion No. 1283/006 dated March 26, 2020, which establishes that “acts of authority” is subsumable in the definition of force majeure provided by article 45 of the Civil Code and, in consequence, it releases both parties from their reciprocal obligations.

<sup>18</sup> Opinion No. 6854 dated March 25, 2020.

occupational risk to which they are subject. Nonetheless, it must be highlighted that a group of parliamentarians has requested the submission of a bill that provides bonuses to this group of workers<sup>19</sup>.

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<sup>19</sup> For further information: <https://bit.ly/39SeTfA>.