



Labornet No. 1205

Clarifying Comments. Executive Order No. 39/2021. Cap on double severance pay – practical case study

Dear All,

I) Executive Order No. 39/2021. Cap on severance pay

This is to inform that the newly passed Executive Order No. 39/2021 places a cap on double severance pay at ARS 500,000.

As a matter of fact, Section 5 of this EO states as follows: During the effective term of the employment emergency, in those cases where the validity of the employment termination without fair cause is not challenged, the employee in question shall be entitled to collect double severance pay in accordance with the provisions of Emergency Executive Order No. 34/19. In addition, Section 6 places a cap: In order to calculate final severance pay, as provided by Section 5 of this EO the amount of double severance pay shall by no means exceed ARS 500,000 (five hundred thousand Argentine pesos).

As a result, the items of the severance package that were usually doubled, such as payment under Section 245 of the Employment Contract Act, notice, thirteenth salary on notice, full termination month and the proportional thirteenth salary, are now capped at ARS 500,000 if when doubled, they exceed this cap.

In other words, the cap of ARS 500,000 applies to the aggregate of items that make up the severance package in case of termination without cause, and not on each one of them, unless they reach this cap.

- For all future negotiations [in case of agreed termination] the new basis for calculating double severance pay shall be taken into account considering this new guideline under Executive Order 39/2021, published in the Official Gazette of January 22, 2021.

- For example: If severance pay under Section 245 of the Employment Contract Act amounts to ARS 2 million, as a result of the mandate of double severance pay, it would amount to ARS 2.5 million.
- In other words, the aggregate of the items that make up the severance package (compensation for seniority, notice, full termination month, and so forth) amounts to ARS 2 million and with cap under Section 6 of Executive Order 39/2021, the total amount will be ARS 2.5 million, plus any items that are not part of the severance package (days worked, proportional thirteenth salary, unused vacation, among others).
- According to Section 5 of this EO, double severance pay shall by no means exceed ARS 500,000.

II) Employment termination without fair cause whose validity is not challenged

Finally, the newly passed Executive Order No. 39 contains the option of an employment termination without cause that must be accepted and validated by employees in writing for effectiveness. This seems to be the right interpretation for the text that reads: “employment termination without cause whose validity is not challenged”. That is why if the Company decides to use this option, employees must give their consent in writing and refrain from challenging termination validity; this provision opens up the possibility of terminating employees without case when employees agree. The possibility that employees may eventually challenge validity and demand reinstatement cannot be completely ruled out.

This rule does not contain any clarifying provisions. In our opinion, this is a possibility – though risky- for which employees must give their express written consent at the same time termination notice is served, IN WRITING, with digital signature or indicating notice of termination without cause under Section 245 of the Employment Contract Act and their consent and acceptance to the termination of their employment contract, voluntarily accepting it and indicating that they would not consider that the termination is null and demand reinstatement. However, there are risks because employees may challenge their consent on the understanding that there is a defect of consent (discernment, will and freedom).

III) Income Tax

For an employment termination by mutual agreement under Section 241 of the Employment Contract Act, below are the legal considerations about Income Tax:

- 1) For senior staff subject to Income Tax under Section 79 of Income Tax Act, regulated by Executive Order No. 976/18:
 - a. Severance pay until the statutory amount set forth in Section 245 of the Employment Contract Act (Vizotti cap, as appropriate) plus ARS 500,000 (provided this amount does not exceed the amount under Section 245 of the Employment Contract Act) in this proportion would be exempt from Income Tax

- b. Severance pay for other items or reason: subject to Income Tax

2) Non-senior staff is not subject to the provisions of Executive Order No. 976/18:

Any severance pay may be exempt from Income Tax, based on the argument that this is compensation paid directly as a result of the voluntary termination of the employment contract, and that is why it is “excluded” from Income Tax 4th Bracket under the terms of subsection 1) of Section 2 of Act No. 20628 in accordance with the precedent by the Supreme Court of Justice of Argentina in the matter of Negri, Fernando Horacio v EN – AFIP-DGI on July 15, 2014 and AFIP Circular 4/2016 Official Gazette August 18, 2016 and General Resolution No. 4003 by analogy.

For an employment termination by mutual agreement (under Section 241 of the Employment Contract Act), severance pay is agreed between the parties and there is no statutory amount established in the law. In practice and based on customs and usage, the general rule is that companies use the maximum mandatory statutory severance pay as a reference to determine the severance package to offer. Those parties who have been negotiating lately should now take into consideration the newly passed Executive Order placing a cap on double severance pay, and the subsequent changes on taxation, which will provide a new framework for their negotiation, unless for any other reason the Company decides to make a different offer, which is not prohibited.

Please do not hesitate to contact us for further information.

Best regards,

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