Regarding your enquiry in connection with payment of profit sharing for the subcontractor companies, please note that pursuant to the amendment made to the Federal Labor Law, which was published on November 30, 2012 in the Federal Official Gazette, effective on December 1st, 2012, the following is set forth:

Article 10. Employer is the individual or entity using the services of one or more employees.

If the employee, pursuant to that agreed or according to practice, uses the services of other employees, the employer of the first employee shall be deemed to be the employer of the others.

Article 16. For purposes of labor standards, **enterprise is the economic unit of production or distribution of goods or services** , and establishment shall mean the technical unit which as a branch, agency or otherwise, is an integral part of and contributes to the achievement of the purposes of the enterprise.

Article 13. Established enterprises that retain work with a view to carry out such work with their own resources, the latter being sufficient to meet their obligations arisen from their relationship with their employees, shall not be deemed to be agents, **but employers**. **Otherwise, they will be jointly and severally liable with the direct beneficiaries of the works or services for the obligations towards the employees.**

Article 14. Individuals using agents for the retaining of employees shall be liable for the obligations arisen herein and the services rendered.

Employees shall be entitled to the following:

I. They will render their services under the same labor conditions and shall have the same rights corresponding to the employees performing similar work at the enterprise or establishment; and

II. Agents may not receive any remuneration or fee deducted from the employees' wages.

Article 15. In enterprises performing works or services exclusively or principally for another enterprise, not having sufficient resources pursuant to that set forth in Article 13, the following standards shall be observed:

I. The enterprise for which the works or services are performed shall be jointly and severally liable for all the obligations to the employees.

II. Employees engaged in the performance of the works or services shall be entitled to labor conditions proportional to those enjoyed by the employees performing similar work at the enterprise for which the works or services are done. In order to determine the proportion, differences existing in the minimum wages in force in the applicable geographic area where the enterprises are located and the other circumstances that might influence labor conditions shall be taken into account.

The approved amendment to the labor law incorporates the "**subcontracting**" concept and in this regard, Article 15 A sets forth that through subcontracting a specific employer named **Contractor**, performs works or services with his employees dependent on him, in favor of a **Contracting Party** which may be an individual or legal entity, that sets forth the tasks of the contractor and supervises the contractor in the development of the services or performance of the works contracted.

This new provision sets forth that such work shall comply with the conditions provided for in Article 15 A, and in the event of failure to comply with this conditions, the contracting party shall be deemed employer for the effects set forth in the law, including social security obligations.

For your knowledge, we hereby insert Article 15 A, which sets forth:

Article 15-A. Work performed under the subcontracting regime is that whereby an employer named contractor performs works or renders services with employees dependent on such contractor, in favor of a contracting party, individual or legal entity, which sets forth the tasks of the contractor and supervises contractor in the development of the services or the performance of the contracted works.

This kind of work shall comply with the following conditions:

a) It may not encompass all of the same or similar activities performed at the workplace.

b) It shall be justified due to its specialized nature.

c) It may not encompass tasks equal or similar to those carried out by the rest of the employees working for the contracting party.

In the event of failure to comply with these conditions, the contracting party shall be deemed **em ployer**
, for all purposes set forth herein, including social security obligations.

Therefore, the following are the conditions required to meet in order to be deemed subcontractor:

a) Services may not encompass all of the activities equal or similar to those carried out at the workplace ; This implies that the party rendering the services may not encompass all of the employees of the enterprise for which the work or services are rendered, also named contracting party.

b) The specialized nature shall be justified; The contracting party shall hire specialized

tasks, an example of which may be cleaning services, surveillance, advertising, etc.

c) It may not encompass tasks equal or similar to those carried out by the remainder of the employees working for the contracting party; Security guards cannot be retained by the person rendering the services and at the same time by the beneficiary (contracting party).

If these conditions are not fulfilled, the contracting party shall be deemed as employer for all purposes set forth in this law, including social security obligations.

New articles 15 B, 15 C and 15 D, set forth the following:

a) That **the agreement** entered into with the individual or legal entity requesting the services and a contractor **shall be in writing** and that **the contracting enterprise shall ensure, at the time of executing the agreement, that the contractor has the documentation and its own resources sufficient to comply with the obligations arisen from the relationship with his employees.**

b) That **the contracting enterprise shall permanently verify, that the contractor enterprise complies with the provisions applicable regarding social security, health and environment at work (** reg
arding the employees of the contractor).

c) The subcontracting system will not be permitted, when contracting party's employees are transferred to the subcontractor in order to decrease labor rights.

In order to be clear, the referred articles are transcribed below:

Article 15-B. **The agreement** entered into by the individual or legal entity requesting the services and a contracting party **shall be in writing**.

The contracting party shall make sure, at the time of executing the agreement referred to in the preceding paragraph,
that the contractor has the documentation and its own resources sufficient to comply with the obligations arisen from the relationships with his employees.

Article 15-C. The enterprise contracting the services **shall permanently ensure that the contractor enterprise complies with the provisions applicable in safety, health and environment matters at work** ,
regarding the employees of the latter.

The foregoing may be complied through a verification unit duly accredited and approved in terms of the applicable legal provisions.

Article 15-D. The subcontracting system will not be permitted when employees of the contracting party are deliberately transferred to the subcontractor in order to reduce labor rights , in this case that set forth in Article 1004-C and following of this law will be applicable.

Article 1004-C. Any person **using the system for subcontracting staff on a willful manner, in terms of Article 15-D of this Law, will be charged with a fine for the equivalent to 250 to 5000 times the general minimum wage** .

On the other hand, in the Congressional Declaration of Purpose of the draft of the amendment to the Federal Labor Law, the following is provided regarding subcontracting:

“3. To rule the subcontracting of staff or outsourcing, **with the aim of avoiding the evasion and elusion of compliance with employer’s obligations.**
For such purpose, the “subcontracting” concept is defined; it is determined that the services agreement shall be in writing; it is set forth that the person receiving the services will be compelled to ensure the solvency of the contractor and that the contractor complies with its social security and health obligations. It is expressly set forth that in all cases the employers and the intermediaries
will be severally and jointly liable regarding the obligations acquired with the employees
.”

The intention of the analyzed articles of the amendment is the following:

- It has the purpose to avoid the evasion and elusion of the compliance of the employer’s obligations.

- It defines a new concept, the concept of “subcontracting” but it does not cancel the concept of provision of services referred to in Article 13 of the Law.

- It determines that the services agreement shall be in writing.

- It sets forth that the person receiving the services will be compelled to ensure the solvency of the contractor and that the contractor complies with its safety and health obligations.

- It expressly sets forth that in all cases, the employers and intermediaries will be jointly and severally liable regarding the obligations acquired with the employees.

Based on the foregoing, we conclude that the Federal Labor Law currently rules 3 different schemes:

1) The **Intermediary.** Which is referred to in Article 10, second paragraph and Articles 12 and 14 of the FLL. That is, the person who does not have its own resources sufficient to comply with its obligations towards the employees, therefore it is concluded that the employer is the one who uses the services of the employees and therefore it is the one responsible for the obligations arisen from the Law and the services rendered.

2) The **Service Provider, (Employer)**, The one that has its own resources sufficient to comply with its obligations towards its employees; therefore if the employer complies with its obligations, it releases the person receiving the services from any labor responsibility.

3) The **Subcontracting**, ruled by the new Articles 15 A, 15 B, 15 C and 15 D of the Federal Labor Law.

From the foregoing analysis, it can be understood that pursuant to the system in force:

a) The company receiving the services is jointly and severally liable for the labor obligations of the services enterprise, only in those cases in which the services enterprise does not have resources to comply with such obligations towards its employees and it does not comply with them.

b) Since it is a “joint and several obligation”, the company receiving the services will only be subject to comply the labor obligations calculated with basis on the results and characteristics of the services enterprise and not calculated with basis on the results and characteristics of the company receiving the services.

It is important to point out that there are Court Precedents and several isolated opinions issued by the Supreme Court of Justice and the several Collegiate Circuit Courts for Labor Matters that grant an additional protection to the employees by acknowledging:

1. In such cases where there is a true subordination of the employees towards a beneficiary, notwithstanding that such relationship is documented in a services agreement, it will be deemed that there is a labor relationship between the beneficiary and the employee.

2. Whenever it is possible to determine that there is a real employer, even when the employees are retained through a services enterprise, both companies will be deemed as one “economic unit” in terms of article 16 of the Federal Labor Law, **being both responsible for the labor obligations towards the employees, that is, jointly and severally liable.**

3. The foregoing in such a form that it does not matter if a services enterprise has resources sufficient to comply with its obligations towards its employees, these (the employees) may state as their real employer the enterprise that benefits from the relevant services if such employees can prove a subordination relationship with such beneficiary enterprise.

The conflict arisen from the interpretation of the provisions of Articles 13 and 15 and Article 15 A of the Federal Labor Law, is that a same contracting party is deemed jointly and severally liable (Articles 13 and 15) and it also is deemed an employer, in which case we believe that the regime of joint and several obligor would be applicable regarding the labor relationship.

However, it may be deemed that, when establishing that the contracting party will be “employer” and not only “joint and several obligor” (as provided for by Article 15 of the Federal Labor Law in force), the possibility that the contracting party sues the contractor for the damages sustained, may be eliminated, due to the unfulfillment of obligations to which it is subject in the agreement entered into both parties.

It is also important to analyze the ruling by the Third Collegiate Court for Labor Matters of the First Circuit issued as a Court Precedent [No. I.3º.T.J/28 (9ª)]:

“CIVIL PROFESSIONAL SERVICES AGREEMENT. IF, THROUGH SUCH AN AGREEMENT A THIRD PARTY IS COMPELLED TO PROVIDE STAFF TO A REAL EMPLOYER WITH THE COMMITTMENT TO RELEASE IT FROM ANY LABOR OBLIGATION, BOTH COMPANIES WILL CONSTITUTE THE ECONOMIC UNIT REFERRED TO IN ARTICLE 16 O THE FEDERAL LABOR LAW AND, THUS, **BOTH ARE RESPONSIBLE FOR THE LABOR RELATIONSHIP WITH THE EMPLOYEE** . Pursuant to Article 3rd of the Federal Labor Law, work is not a commodity. On the other hand, numeral 16 of the cited law sets forth that for purposes of labor standards, the enterprise is the Economic Unit of production or distribution of goods or services. In this context, when an enterprise takes part as a supplier of the workforce through the execution of a civil professional services agreement, or through any legal action and another enterprise contributes with the infrastructure and capital, and together they achieve the good or service produced, they comply with the corporate purpose of the Economic Unit referred to in the mentioned Article 16; therefore, **for purposes of this matter, they constitute an enterprise and, therefore, they are liable for the labor relationship with the employee** .”

Notwithstanding the foregoing, last April 9, 2014 the Plenary Session of the Federal Conciliation and Arbitration Board adopted the interpretation and application criterion regarding that set forth in the new Article 15-A of the Federal Labor Law, with respect to the Work under the **"Subcontracting"**
System (outsourcing), which application is compulsory in the resolution of specific cases by the several Special Boards composing the Federal Board of Conciliation and Arbitration.

The complete text of the criterion is the following:

"… It has been legally explored, both for the doctrine and for court precedents, that the characteristic element of the labor relationship is the subordination, understood as the power of command of the employer correspondent to a duty of obedience of the employee, regarding all that related with the work contracted.

In the subcontracting system, the contractor executes works or renders services with its employees, in favor of an individual or legal entity named contracting party, who is entitled to set the tasks to be carried out by the first one, to supervise the performance of the services or the execution of the work contracted; this is, due to its characteristics it constitutes an exception to the general rule whereby the labor relationship shall be direct and for an indefinite time.

In order for the agreements between the individual or legal entity named contracting party and the contractor to become effective, the agreement shall be in writing and it shall fulfill all of the requirements set forth in Articles 15-A and 15-B of the Federal Labor Law.

The configuration requirements, which define the scope of the subcontracting system, are the following:

-It may not encompass all of the activities equal or similar to those carried out at the workplace.

-It shall be justified due to its specialized nature.

-It may not comprise tasks equal or similar to those performed by the rest of the employees working for the contracting party.

Failure to comply with these conditions entails a penalty for the contracting party who is the beneficiary of the services, consisting in considering it an employer, with the resulting duty to be liable for the labor and social security obligations with the employees, pursuant to Article 13 of the Federal Labor Law.

Failure to comply with one of the requirements will make unnecessary the study of the remaining requirements.

Therefore, initially, the party responsible for the compliance with the labor obligations will be the contractor, but in case that it does not comply with wages and benefits or with payment of the social security dues and contributions, it will correspond to the contracting party as the beneficiary of the work executed or the services rendered, to be liable for the obligations arisen from the labor relationships.

In this context, when in a labor lawsuit the defendant denies the labor relationship and alleges the existence of a subcontracting system, the Board shall study the cause of action on a detailed form and correlated with the evidence introduced, in order to ensure compliance with all of the requirements set forth in Articles 15-A and 15-B of the Federal Labor Law.

Therefore, if from the evidence it is deduced that all of the requirements referred to in the aforesaid Article 15-A were fulfilled, but it is evidenced that the contractor failed to comply with its labor and social security obligations towards his employees, the liability of the contracting party will be determined as beneficiary of its services.

The determination of the liability of the contracting party does not release the contractor from

complying with its obligations to the employees.

Therefore, based on the authority set forth in Article 615, Section V of the Federal Labor Law, the Plenary Session of the Federal Conciliation and Arbitration Board, in order to standardize the criterion for ruling of the Special Boards with federal jurisdiction, approves the following criterion:

LABOR RELATIONSHIP UNDER THE SUBCONTRACTING SYSTEM. In the subcontracting system, the contractor executes work or renders services with its employees, in favor of an individual or an entity named contracting party, who will be entitled to set forth to the first one the tasks to be carried out, to supervise the performance of the services or the execution of the work contracted; this is, due to its characteristics it constitutes an exception to the general rule, according to which, the labor relationship shall be direct and for an indefinite time.

In order for subcontracting to have full effect in trial, the defendant shall prove the existence of an agreement in writing, in which the following requirements are fulfilled:

 It shall not encompass all of the activities equal or similar to those performed at the workplace.

 It shall be justified due to its specialized nature.

 It shall not comprise tasks equal or similar to those carried out by the rest of the employees working for the contracting party.

Failure to comply with one of the requirements makes the study of the remaining requirements unnecessary.

Consequently, if in a labor lawsuit the defendant denies the labor relationship and alleges de existence of a subcontracting system, the Board shall study the cause of action on a detailed

form and in correlation with the evidence introduced in order to ensure compliance with all of the requirements set forth in Articles 15-A and 15-B of the Federal Labor Law; since, initially, it is the contractor the party responsible for the compliance with the labor obligations, but in case that it is evidenced that it failed to comply with wages and benefits or with payment of the social security dues and contributions, it will correspond to the contracting party, as beneficiary of the work executed or the services rendered, to be liable for the obligations arisen from the labor relationships.

Determination of responsibility of the contracting party does not release the contractor from its compliance with the obligations towards the employees, pursuant to Article 13 of the Federal Labor Law …".

From the transcription above, we come to the following conclusions with respect to the criterion assumed by the Federal Boards:

1. The application of the Criterion issued by the Plenary Session of the Federal Conciliation and Arbitration Board is compulsory for all the Special Boards of that Federal Court and with it, it is effective and will be applicable to all of the companies which activity is subject to the Federal Jurisdiction.

2. It sets forth its own interpretation of the content, effects and application of Article 15-A of the Federal Labor Law, which created the new legal labor concept of "Work under the Subcontracting System", established and drafted on a very confusing manner.

3. It determines that the liability of the contracting party is secondary, but not joint and several. "Secondary Liability" is understood based on the fact that for the contracting party to become an obligor, the contractor would have first to fail to comply with its obligations. If the liability were joint and several, both parties would be simultaneously obligated and compliance of the obligations could be demanded from both on an independent manner and at any time, without need of failure to comply by the contractor.

4. It sets forth that in the event that the contracting party is declared employer of the contractor's employees, it will only be compelled to comply with labor and social security obligations acquired by the contractor with its employees, which means that the contracting

party will not have to grant or comply the labor conditions agreed with its own employees, and neither to share profits with the contractor's employees.

It is important to point out that it is a criterion which compliance is not compulsory for the Local Conciliation and Arbitration Boards in the Country and that it is subject to the final resolution and criterion issued by the Collegiate Circuit Courts for Labor Matters in the Country. Notwithstanding, it is an important progress for setting the criterion of the federal authority and a starting point for the final criterion to be assumed in this regard.

Applicable Conclusions:

1. Upon the analysis of the existing enterprises within the group, we believe that the conditions set forth in Article 15 of the Federal Labor Law may be fulfilled, in order for the enterprises providing staff to be deemed as the exclusive employers of such employees and in order to be able to avoid payment of profit sharing by the holding company.

2. That the participating companies are companies that have technical, financial and human resources, as well as their own resources sufficient to comply with the obligations arisen from the relationships with their employees, who will have the training necessary for the provision of services to which they commit.

Due to the foregoing, it is important to emphasize that:

1. It can be deduced from Article 13 of the law that **Employer** is the company that renders services and has its own resources sufficient to comply with the obligations arisen from the relationships with its employees.

As it is the case of the Contractor companies, that will render services and if these service

provider companies have their own resources sufficient to comply with their obligations and they comply with same, this releases liability of the companies involved and the other companies to which services are rendered.

2. That Article 15 of the law determines that regarding companies executing work or rendering services on an exclusive or principal manner for others, which do not have their own sufficient resources pursuant to that set forth in Article 13, will have the following consequences:

- The beneficiary company will be jointly and severally liable for the obligations acquired with the employees of the service provider.

- Employees used for the execution of work or provision of services will be entitled to enjoy the labor conditions proportional to those enjoyed by the employees executing similar work at the beneficiary company.

However, if the Contractor companies execute the work and render services on an exclusive and principal manner for the companies involved and they have their own resources sufficient to comply with their obligations to the employees and they comply with same, the consequences set forth in these Articles of the law will not be applicable to them.

3. That new Article 15 A defines subcontracting as the concept through which an employer named **contractor**, executes work or renders services with his employees under its dependence in favor of a **contracting party**, who may be an individual or an entity, which sets forth the tasks of the contractor and it supervises the contractor in the provision of the services or in the execution of the work contracted.

It is set forth that this type of work shall meet three conditions and, in the event of failure to comply with each one of those conditions, the contracting party will be deemed as **employer for all the effects set forth in the law**, including the social security obligations.

The labor amendment introduces to the law the “subcontracting” concept, in Article 15 A that rules the work under such system and it determines:

Work performed under the subcontracting regime is that whereby an employer named contractor performs works or renders services with employees dependent on such contractor, in favor of a contracting party, individual or legal entity, which sets forth the tasks of the contractor and supervises contractor in the development of the services or the performance of the contracted works.

“It is the regime whereby an employer named **“Contractor”** performs works or renders services with employees dependent on such contractor, in favor of a **“Contracting Party”**, individual or legal entity, which sets forth the tasks of the contractor and it supervises contractor in the development of the services or the performance of the contracted works.”

The conditions set forth and that must be fulfilled are the following:

c) It may not encompass tasks equal or similar to those carried out by the rest of the employees working for the contracting party.

In the event of failure to comply with these conditions, the contracting party shall be deemed **em ployer**
, for all purposes set forth herein, including social security obligations.

1. **Services may not encompass all of the same or similar activities performed at the workplace.**

This condition does not apply in our case, since the **holding company** will not have any employee.

However, it will also have several companies that will provide services and which will retain staff.

2. **It shall be justified due to its specialized nature.**

This condition will be applicable, since all of the services to be rendered are services of that nature.

3. **It may not encompass tasks equal or similar to those carried out by the rest of the employees working for the contracting party.**

This condition could be applicable, if the agreement with the services companies is executed, since the tasks at these companies are of a managing and administrative nature and sales and tasks different from those of the **holding company**.

It is important to remember that, in the event of failure to comply with all of these conditions, the **Contracting Party** will be deemed employer for all the purposes set forth in the law, including social security obligations.

If the agreements are executed among the companies of the group that will pay to the employees and the holding company, the conditions will not be fulfilled and therefore the holding company may be deemed as Employer of the employees assigned to the Project.

However, if the companies of the group enter into the agreement, leaving aside the holding company, the conditions would be fulfilled and the consequence set forth would not be applicable.

However, if in the first of the assumptions the holding company is deemed Employer, the assumption referred to in Article 13 of the Law would apply, that is, if the services provider has its own resources sufficient to comply with its obligations and it complies them, the foregoing will release the holding company from the labor obligations, since such obligations may not be duplicated.

New articles 15 B, 15 C and 15 D determine that:

- The agreement entered into the individual or entity requesting services and a contractor shall necessarily be in writing.

In our case this would be fulfilled, because the agreement will be executed in writing.

- That the contracting company shall ensure, upon execution of the agreement referred to in the preceding paragraph, that the contractor has the documentation and its own resources sufficient to comply with the obligations arisen from the relationships with its employees.

It is something to be administratively done.

- That the contracting company shall permanently ensure that the contractor complies with the applicable provisions regarding safety, health and environment at work with respect to contractor’s employees.

This is set forth in the Law and it shall be complied.

- That the subcontracting system will not be permitted, when employees are deliberately transferred from the contracting party to the subcontractor in order to decrease labor rights.

In our case, employees will not be deliberately transferred to the holding company.

All that has been analyzed will give rise, no doubt, to interpretations that will result in litigations and lawsuits for payments, especially regarding Profit Sharing; however, there are sound defenses that may be supported and filed against these potential lawsuits, which will be

determined by the Conciliation and Arbitration Boards and afterwards they will be interpreted by the Collegiate Courts.

In the relevant legal arguments, it may be stated that:

- There cannot be two employers on the same labor relationship.

- There can be two joint and several obligors, but if the employer complies with its obligations, these obligations will be deemed fulfilled.

- Obligations may not be collected twice, there cannot be two Christmas bonuses, two payments for vacations or two benefits of a labor nature accrued in the labor relationship.

- Only if service providers fail to comply, the joint and several liability in the fulfillment of the obligations by the companies involved will operate, but on that assumption only.

- Finally, in the event of lawsuits for Profit Sharing, it shall be taken into account that the

rules of same do not change, that is, the same 10% of the Income Tax applies and it will be distributed among the employees according to wages paid and days worked, pursuant to that determined by the Commission formed for such purpose, this is, followed by all the proceeding set forth for such purpose by the Law and which must be complied, therefore it is difficult, even for these lawsuits, to thrive.

Therefore, we suggest that the agreement be executed between the companies of the group, excluding the holding company.

With their own resources sufficient (assets) the service provider companies **may** prove their economic capability to comply with the obligations arisen from the relationships with their employees.

The service provider company will be the only one executing services agreement for the provision of staff with outsourcing companies.

The executed services agreements for provision of staff shall be reviewed and amended, if applicable, because these agreements shall specify that the service provider company has the documentation and its own resources sufficient to comply with the obligations arisen from the relationships with its employees. Further, periodical due diligences shall be established to ensure that the applicable provisions regarding social security, health and environment are complied with at work.

There not being further matter to discuss, do not hesitate to contact us if you have any

questions or comments on this matter.

Sin mas por el momento, nos ponemos a sus órdenes para cualquier aclaración en relación con la presente.

Cesar Roel Abogados