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Considerations on equality and non-discrimination for companies, in the context of COVID-19

This document is divided into four parts. The first one contains a brief introduction. The second one, addresses the concepts of equality and non-discrimination, the third one analyzes when a discriminatory act is configured, and the fourth one contains some considerations from comparative and international law.

I. Introduction

Health crises, especially those of a global nature such as pandemics, always require measures of rigorous compliance and extreme caution, and the COVID-19 epidemic evidences this.

However, as a consequence of the foregoing, companies aiming to attend and prevent risks, due to ignorance or bad advice, could be incurring in serious offenses derived from discriminatory acts that may lead to legal contingencies, most of them in the non-jurisdictional sphere, and many others of a litigious nature, whether in civil, labor or even criminal matters.

It should be noted that, despite the fact that discriminatory acts are being committed without intention, this is irrelevant for the determination of liability, since the highest standard (i.e. the international one) recognizes the existence of a discriminatory act despite the fact that this happened without the intention to discriminate.

In times like the current ones, deriving from the COVID-19 contingency, the prevention protocols for discrimination are put to test, especially in the case of users of services and products, who could be victims of direct or indirect discriminatory acts, which could cause the company considerable damage, as happened in Mexico in the residential complex "Parque Residencial Azcapotzalco"⁵, where the administration of the condominium itself was involved, by prohibiting the entry of food to one of the tenants who is infected with COVID-19, arguing that it was a security measure.



II. Equality and Nondiscrimination

The concepts of equality and non-discrimination are commonly confused as synonyms, however, this is a serious mistake.

It should be made clear that the concept of equality must be treated as a generic concept, while non-discrimination results from specific treatment, which means related “subspecies” exist, if we take equality as genre (such is the case of the so-called non-discriminatory differential treatment).

It should be noted that the construction of a definition of equality from an international law perspective, has focused mainly on four areas of importance, namely: (i) structural methods to prohibit discrimination and, where appropriate, protect equality; (ii) analysis of discriminatory intention as an element of existence of discrimination; (iii) setting a limit between justified and unjustified distinctions; and (iv) coherence and proportionality between special protection measures and non-discrimination.

A first notion of equality is that of the prohibition of any arbitrary treatment, based on the principle that the law should be applied in a similar way to every person regardless of their characteristics, which has been translated in international treaties as formal equality or equality before the law, implying that, when the latter makes classifications between people, arbitrariness must be avoided, having to be objective and reasonable.

The European Court of Human Rights has already defined an equality test to determine whether the measures adopted in a specific case guarantee equality or if, on the contrary, they are discriminatory⁶. This consists of the following:

- assess whether the measure is suitable to achieve a constitutionally or conventionally acceptable purpose;
- consider whether the measure is necessary, and if there is no other less harmful alternative means; and if the measure is proportional in the strict sense, that is, to weigh between what is achieved through the restriction and the affectation of the right to equality in the specific case, having to achieve a greater benefit of rights without excessively affecting the restricted right.

The second notion of equality whose treatment must be conjunctive with that of the prohibition of any arbitrary treatment, is that of the social recognition of the existence of certain groups that have been systematically excluded from the enjoyment and exercise of their rights, and that it is the duty of the State to prevent this situation from continuing by reversing the effects of this historical marginalization, through social programs and regulation.



Consequently, in addition to the ordinary equality test already referred to, there is the strict equality judgment, which is applied to analyze the existence of "suspicious categories" ⁷ and their use, as a reasonable cause of justified different treatment. In other words, when said categories are involved in the execution of some specific measure, the burden of proof is reversed, since the illegitimacy of these measures is presumed and, if they are accepted, they must necessarily meet criteria of imperative need that justify the differentiation of the treatment. Finally, it is worth remarking that a discriminatory act can be constituted directly and indirectly. The first occurs when an act is intended to make a differentiated treatment whose result is harmful to human rights. The second does not necessarily translate into concrete or visible actions, but may be through provisions, criteria or practices, which are apparently neutral, that a person or group of people are put at a particular disadvantage with respect to others without any objective justification (once again confirming that the intention is irrelevant to the justiciability of a discriminatory act).

III. When is a discriminatory act configured?

International human rights law has clarified which actions are considered discriminatory.

The first article of the Convention to Eliminate All Forms of Racial Discrimination ("CERDC"), its correlative with the same number of the Convention to Eliminate all Forms of Discrimination against Women ("CEDAW"), as well as the Article 2 of the Convention on the Rights of Persons with Disabilities ("CDPD"), constitute the minimum standard to identify a discriminatory act.

As per the aforementioned provisions, it is possible to determine if an act is discriminatory, such is configured by any distinction, exclusion, restriction or preference, whose purpose or result is to nullify or impair recognition, enjoyment or exercise of any right.

However, some clarifications are pertinent. The so-called "affirmative actions", which in essence constitute preferential acts, do not constitute discrimination as long as they are directed at historically violated groups. For example, an action such as the hiring of exclusive jobs for people of African descent or women, where there is an evident lag in the equality of opportunities of said population groups, would not constitute discrimination.

It should be noted that only CERD foresees that "preference" is discriminatory, since CEDAW and the CDPD do not consider it as such. This takes into account the CERD context, as an international instrument that was an immediate response to the difference in treatment that certain groups lived in different parts of the world under arguments of "racial or social superiority" (such as Afro- descendants or indigenous peoples), which it led to certain population groups being preferred over others, generating a situation of general exclusion. Hence the specific mention in the international instrument.



Consequently, the CEDAW and the CDPD omitted the preference as a constitutive action of discrimination, since it is through affirmative actions, which can be translated into certain preferential treatment, through which equal opportunities are achieved. The foregoing is clearer in the definition that the CDPD foresees on "discrimination on the basis of disability", where it adds that the denial of reasonable adjustments⁸ will be considered as a discriminatory act.

As a consequence, the configuration of the aforementioned is not sufficient, it is essential to consider the particular characteristics of the suspicious category in question.

IV. Conclusions and Considerations

The population infected with COVID- 19 can be considered as pertaining to a suspicious category for the purposes of shaping a discriminatory act, since due to their particular health condition, they may suffer acts that can, directly and indirectly, annul or impair the recognition, enjoyment or exercise of any right.

As a general rule, in the field of private relationships, the principle of equality is applied in a nuanced way, since it must be made compatible with other values or parameters that have their ultimate origin in the principle of the autonomy of the will, manifesting itself through the rights and duties that arise from a contractual relationship, having necessarily to assess the proportionality of the measures that allow compatibility, weighing between what is achieved through the restriction and the affectation to the right to equality in the specific case.

In most of the legislations around the world, discrimination is be punishable through civil law (normally through non-material damage or non- contractual responsibilities), and in many others even through criminal law (as in the case of Mexico City, where discrimination is criminalized in terms of article 206 of the local Criminal Code).

Depending on the jurisdiction, the preexistence of protocols for the prevention of discrimination and policies of inclusion and accessibility, may mitigate the liability. However, despite having or not a policy or instruments in this matter, international and comparative experience has already proven that it is always positive to have them in the event of any contingency.

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¹ Abraham Nava. (2020); "Mexican with Covid-19 narrates the harassment of his neighbors"; March 23, 2020, from Excelsior. Website:<https://www.excelsior.com.mx/comunidad/mexicano-con-covid-19-narra-el-hostigamiento-de-sus-vecinos/1371350>

² European Court of Human Rights; Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, Judgement of July, 23, 1968, paragraph 10.

³ When conditions that may threaten the correct exercise of the right to equality are identified, which leave a person or group of people defenseless, the existence of a suspicious category is configured.

⁴ Reasonable adjustments, according to the CDPD, are the necessary and adequate modifications and adaptations that do not impose a disproportionate or undue burden, required in a particular case, to guarantee people with disabilities the enjoyment or exercise, in equal conditions with others, of all human rights and fundamental freedoms.