



Informational Bulletin

Constitutional Court Sentence C-593 of 2014

Disciplinary proceedings requirements and formalities

The Constitutional Court issued at the end of last year Sentence C-593 of 2014, yet only in 2015 was the complete text of the same published as well as its application by some judges, establishing a series of requirements and formalities to be met by private entities and employers when carrying out a disciplinary proceeding against any employee. With this Sentence the Constitutional Court seeks to fully comply with Article 29 of the Political Constitution of Colombia setting forth the fundamental right to due process for all those inhabiting the country.

In light of the above it is advisable to study such topic and the implications from the decision by the Constitutional Court given that private companies and employers have been assigned certain obligations and responsibilities which should be known and taken into account when conducting a disciplinary proceeding.

In Sentence C-593 of 2014, the Constitutional Court established the obligation employers have of following the rules of due process in connection with disciplinary proceedings. The Court mentioned not only judicial and administrative entities but also private entities enforcing any disciplinary authority.

The Court has established - in the aforesaid sentence - that it is necessary for private entities to determine specific minimum requirements, manners and parameters defining and establishing the limits for using the penalizing authority of the same. Likewise, such established minimums should allow employees and/or those subject to a disciplinary proceeding to learn the conditions under which the proceeding is or will be conducted to be applied to the employee.

Likewise, the Court has considered that it is necessary for each stage of the disciplinary proceeding to be defined and differentiated as otherwise the penalty imposed could be the result of a decision arbitrarily taken and may be subject eventually to nullification by the labor jurisdiction or even by means of a writ of mandamus action due to infringement of fundamental right to due process.

The Court stated that each and every proceeding conducted by authorities or private persons, which may entail imposing any type of penalty, must guarantee the following principles: - Presumption of innocence.- "In dubio pro reo"[when in doubt for the accused].- Right to contradict evidence.- Impartiality .- "Nulla poena sine lege" [the penalty should be established in a law or Internal Rules].- "Non bis in idem" [No double jeopardy].- Res Judicata [matter decided].- "Reformato in peius"[modify charges against the individual under investigation] and First and Second instance [the decision is reviewed by the hierarchical superior of whoever took the same].

Furthermore, in addition to assigning burdens and obligations on private entities, the Court also established in the aforesaid sentence the minimum elements that in the opinion of such Court the



Internal Work Rules should contain in connection with disciplinary proceedings and imposition of penalties.

According to the Constitutional Court such elements and requirements are:

- A formal communication advising the opening of the disciplinary proceeding addressed to the person imputed with conducts that may be subject to a penalty.
- Filing of the imputed charges, which may be either oral or written, provided they clearly and precisely state the conducts and the disciplinary offenses such conducts may lead to and the provisional qualification of such conducts as disciplinary offenses.
- Definition of consequences stemming from such conduct. The Constitutional Court states that the Substantive Labor Code provides not only that the conducts leading to a penalty but also the corresponding consequence or termination of the employment contract must be previously, expressly and precisely provided under the Internal Work Rules of the company.
- Providing all evidence proving the charges filed to the imputed person.
- Specification of a term during which the employee should file pleadings, challenge evidence against held against the same and submit any other evidence such employee may deem convenient to substantiate his/her pleadings and refute those held by the company.
- Possible penalties that may be imposed taking into account that the penalty should be proportionate to the events leading to the same.
- The possibility for an employee subject to a disciplinary proceeding to challenge by filing the corresponding remedies each and every one of the decisions whether before the hierarchical superior of the officer who imposed the penalty and the possibility of resorting to ordinary labor jurisdiction.
- The final pronouncement by the employer should include a reasoned act and the decision should be coherent with the charges files and the evidence taken into account in the respective disciplinary proceeding.

Conclusions:

It is important to take into account that most companies have been observing and applying for several years now some of the principles under the sentence, which had already been subject to other pronouncements from the constitutional justice and the ordinary justice, such as determination of employee obligations and prohibitions, the violation of which may lead to disciplinary proceedings that have been set forth in work rules, corporate policies, codes of conduct and employment contracts.

Likewise, companies have regularly conducted objective and thorough investigations to analyze the possible offenses committed by an employee that may lead to the imposition of a penalty or termination of the employment contract.



Likewise, the employee's right to defense has been observed under "pleading proceedings" and the possibility of the employee attending such proceedings with two members of the union such employee belongs to.

Notwithstanding the above, the sentence contains new matters that should be especially analyzed and taken into account to prevent an employee penalized or dismissed without stringently applying the respective procedure from filing a writ of mandamus action or a proceeding before the ordinary labor jurisdiction seeking to render the penalty or termination of employment contract invalid due to violation to the fundamental right of such employee to the due process.

The main new aspects in connection with disciplinary proceedings whose implementation we suggest analyzing and implementing to comply with the Constitutional Court's sentence are the following:

- Adopt measures intended to guarantee the employee's right to know exactly the offenses imputed to the same, the rules setting forth such offenses and the evidence held by the company and based on which such employee may be subject to penalties or termination of the employment contract with just cause.

For this purpose, it is advisable to summon in writing the employee to pleadings in order to be able to evidence that such summon was in fact delivered and the same meets applicable requirements, given that the summons, according to the Court, must expressly state the purported offenses committed by the employee, any rules the employee may have breached with such conduct and the criteria to be employed in making the decision.

- In light of the above, it would be necessary to provide the employee subject to the disciplinary proceeding with any evidence held by the company to submit the summons to pleadings, without neglecting the fact that there are regulations protecting the confidentiality of certain documents and the right to privacy of the remaining employees.
- Take measures intended to guarantee the employee's right to request collection of evidence in order to prove his/her not being guilty of the same in connection with the purported disciplinary offenses or exonerating causes of liability. It is also advisable to state expressly and in writing to the employee subject to the disciplinary proceeding that the same may request collection of any evidence such employee may hold to have in his/her favor, which evidence must be collected by the employer.
- Ensure that the communication advising the employee the penalty or decision of terminating justifiably the employment contract is duly reasoned and coherent with respect to the qualification previously made of the conduct leading to a penalty or termination of the employment contract and which is based on conducts or offenses imputed to the employee and which have been proved.
- Guarantee the employee's right to have the penalizing or employment termination decision reviewed by a hierarchical superior of the person making such decision. It is necessary to establish the possibility of a second instance having sufficient autonomy to make a different



decision than the one made in first instance and it is necessary to determine a time period for the employee to request the review of the first decision and the person such request should be addressed to.

It is necessary to review the Internal Rules taking into account this sentence and adjust the same to the new guidelines being espoused by the judges or eventually state in the Internal Rules that the procedure will be established as a separate Policy from such Rules, which should have been duly approved and disseminated.

We look forward to receiving your questions or comments in connection with application of Sentence C-593 of 2014 and will gladly provide our advice in general in drafting a procedure in alignment with the needs of your company within the parameters established by the Constitutional Court and also in making any amendment required to the Internal Rules and/or Policies or in conducting any disciplinary proceedings that may be warranted, further reiterating our disposal to assist you in the preparation of summons, questionnaires for pleadings, assistance in such proceedings, drafting of penalties and follow-up to the same.

Sincerely yours,

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