

INSOLVENCY: Salaries payment from the guarantee fund. Controversies and news

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The opening of the insolvency proceedings generates negative consequences for the economic path of a company, especially when it is declared too late to benefit from the real advantages offered by the Insolvency Law. Some of them concern the employees of an insolvent company, who are affected, on the one hand, because they have not received their salaries, the insolvency being characterized by insufficient funds to pay the debts due, and on the other hand, because insolvency can cause the termination of their labor agreements where the chances of company's recovery are low.

In this context, following the appearance of the Insolvency Law no. 85/2006, was also adopted the Law 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, through which the state grants a facility to insolvent companies, respectively to their employees, by paying outstanding salaries, any other compensations or monetary indemnities, calculated for a period of 3 calendar months prior to or subsequent to the date of opening the insolvency proceedings.

This Guarantee Fund is constituted by the insurance contribution for work, due by the employers, as it is provided by art. 211 of the Fiscal Code, currently being in the amount of 0.25%, calculated on the gross earnings of employees / other assimilated persons.

The conditions for granting this facility by the state through the Employment Agencies were: (i) the issuance of a final court decision to open the insolvency proceedings and (ii) the total or partial withdrawal of the administration right.

Although this facility was provided by law since 2006 (in force since January 1, 2007), it was not always accessed by insolvency / bankruptcy companies, especially when there were assets in their patrimony, most often due to formalities and bureaucracy specific to the public social insurance system. The administrator / judicial liquidator usually liquidates the assets in the procedure and only after makes distributions to the employees who, patiently, wait at the credit table, sometimes for years.

When this facility was accessed, then the Fund paid to the beneficiaries the outstanding salaries listed in the creditors' table and related to the three calendar months before or after the opening of the procedure, and afterwards, the Fund subrogates to the beneficiaries' rights. Thus, (1) in case of distributions in the insolvency procedure to this category of creditors - employees - as a result of assets' liquidation, debt recovery, etc., the Guarantee Fund benefit from distributions instead of the beneficiaries who received the indemnities, and (2) in case the insolvency procedure is closed, as a result of the recovery of the employing company, the latter it is obliged to return the amounts paid from the Guarantee Fund, within 6 months from the pronouncement of the court decision which closed the procedure.

The companies were also discouraged to use this facility by the different interpretation of Law 200/2006 and the methodological norms for applying the Law assigned at its discretion by the Territorial Employment Agencies, because the two conditions mentioned above were not always met by the same procedural act or at least by different decisions but pronounced within 3 calendar months.

By the court decision to open the insolvency procedure, the right of administration is not automatically canceled, the latter being possible to happen over 3 months from the date of opening the procedure and, in most cases, only on the date of declaring bankruptcy. Also, on the other hand, the pronouncement of bankruptcy (by not declaring the intention to reorganize and not submitting a plan or by failing of the fulfillment of the reorganization plan) is also done by a court decision, which, this time, automatically raises the right of administration, but there were no outstanding salaries prior to bankruptcy, but long before, on the date of the first opening of the insolvency proceedings. The different interpretations of the authorities allowed neither one nor the other to benefit from the payment of the outstanding salaries from the Guarantee Fund, the ideal cases being only those in which, from the very beginning, the bankruptcy procedure was opened in a simplified form.

Only in 2018, the Supreme Court of Justice - Panel for resolving legal issues, being notified by the Court of Appeal Brasov - Administrative and Fiscal Litigation Section, issued Decision no. 16 / 05.03.2018 establishing that:

- the period of maximum 3 months, for which the Guarantee Fund can take over and pay the salary claims of the insolvent employer, is in the reference interval of 3 months immediately prior to the opening of the insolvency procedure and 3 months immediately following the opening of the insolvency procedure;
- the period of 3 months, for which the Guarantee Fund can pay the salary claims of the insolvent employer, is reported exclusively on the date of opening the insolvency procedure.

Unfortunately, this interpretation, even if it has clarified from a legal point of view the reference date for establishing the period for which this facility can be granted as the date of opening the insolvency proceedings, (eliminating the situations in which a [new] opening decision is subsequently issued - case of the bankruptcy procedure), from an operational point of view determined / perpetuated a limitation of the insolvent companies that could qualify for the coverage of the salaries from the Guarantee Fund, only to the ideal cases previously mentioned.

That is why, in July 2020, the Plenum of the Constitutional Court ruled on the exception of unconstitutionality of the provisions of art. 15 para. (2) of Law no. 200/2006 on the establishment and use of the Guarantee Fund for the payment of salary claims, in the interpretation given by Decision no. 16 of March 5, 2018 of the Supreme Court of Justice - Panel for resolving legal issues.

The Constitutional Court considered the legal provisions unconstitutional compared to art. 41 para. (2) referred to in art. 16 para. (1) of the Constitution, in the interpretation given by Decision 16/2018 of the Supreme Court, because the limitation of the period of granting salary rights paid from the Guarantee Fund for the payment of salary claims, established by Law 200/2006, at the first 3 months following the date of opening the insolvency procedure, ignores the fact that the administration right (the second sine qua non condition for the payment of these salary claims) can be canceled even after the expiration of the 3 months from the opening date procedure, if the insolvent debtor employer opts for the general insolvency procedure and declares its intention to reorganize.

Following the declaration of unconstitutionality, the Ministry of Labor launched on 19.11.2020 in public debate the draft law meant to adapt the aforementioned legal framework to the different cases encountered in practice, by amending Law 200/2006, in order to eliminate the condition regarding the cancelation of the company's administration right, the applicants proving only the opening of the insolvency procedure by the final court decision.

After the legislative process is completed and this amendment will enter into force (probably in 2021), finally Law 200/2006 will be able to be applied in a unitary and non-discriminatory way for all employees who become creditors in an insolvency procedure, regardless of who belongs the right of administration (to the company or to the judicial administrator).

It is also true that the Guarantee Fund will be burdened with demands for outstanding salaries in the next period, especially in the context of an upward trend of the number of companies that will declare the insolvency, determined by the unpredictability of measures to prevent and stop the spread of the virus Covid-19.

On the other hand, employers should not take advantage of this facility during the pre-insolvency period, it is well known that the chances of a company's recovery consist of efficient management, but also a qualified personnel, which will remain on the barricades of insolvency, ensuring the fulfillment of a reorganization plan, if they will receive their remunerations on time.