

Alerta Legal



6 de abril de 2015

Para más información

Cecilia Pastor
cecilia.pastor@bakermckenzie.com

Jesús Santos
jesus.santos@bakermckenzie.com

Ester Navas
ester.navas@bakermckenzie.com

Tel: +34 230 45 00

Los Programas de Compliance ya son una exigente de responsabilidad penal para las Compañías

El pasado 31 de marzo de 2015 se publicó en el Boletín Oficial del Estado la Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.

Como consecuencia de la aprobación de esta Ley Orgánica, la implementación de un Programa de Compliance ha pasado de ser una mera recomendación a convertirse en una exigencia para todas aquellas compañías que quieran desarrollar su actividad con plena seguridad.

En particular, la Ley Orgánica 1/2015 establece que las compañías quedarán exentas de responsabilidad penal si cuentan, antes de la comisión del delito, con un modelo de organización y gestión que incluya las medidas de vigilancia y control idóneas para prevenir delitos de la misma naturaleza o para reducir de forma significativa el riesgo de su comisión. Es decir, si cuentan con lo que tradicionalmente se conoce como Programa de Compliance.

En todo caso, y para que este Programa de Compliance sirva de exigente, es necesario que vaya acompañado de otras medidas que la propia Ley Orgánica recoge y que son las siguientes:

1. Que se haya nombrado un Responsable de Compliance / Órgano de Compliance para la supervisión del funcionamiento y del cumplimiento del Programa de Compliance, con poderes autónomos de iniciativa y de control o que tenga encomendada legalmente la función de supervisar la eficacia de los controles internos de la compañía. En compañías que estén autorizadas a presentar cuenta de pérdidas y ganancias abreviada, estas funciones pueden encomendarse directamente al órgano de administración;
2. Que los autores individuales hayan cometido el delito eludiendo fraudulentamente el Programa de Compliance, y
3. Que el Responsable de Compliance / Órgano de Compliance no haya incurrido en omisión o ejercicio insuficiente de sus funciones de supervisión, vigilancia y control.

Asimismo, la Ley Orgánica da las pautas de los requisitos que entiende que deben cumplir los Programas de Compliance para servir de eximente, y que no son otros que los que ya se venían exigiendo en jurisdicciones como EEUU y el Reino Unido:

1. Mapa de riesgos: de los delitos que deben ser prevenidos.
2. Políticas y Procedimientos: que prevengan los riesgos delictivos detectados.
3. Modelos de gestión de los recursos financieros: adecuados para impedir la comisión de los delitos que deben ser prevenidos.
4. Sistema de whistleblowing: obligación de informar al Responsable de Compliance / Órgano de Compliance de posibles incumplimientos del Programa de Compliance.
5. Sistema disciplinario: que sancione las infracciones del Programa de Compliance.
6. Auditorías: verificaciones periódicas y adaptación del Programa de Compliance a cualesquiera nuevas circunstancias o necesidades.

La Ley Orgánica entra en vigor el próximo 1 de julio de 2015, si bien, y en aplicación del principio de retroactividad de la ley penal más favorable, a nuestro juicio, las compañías que se hayan adelantado y hayan implementado un Programa de Compliance, en los términos aquí descritos, ya estarían arropadas por la eximente. No obstante, en estos casos, podría no estar de más realizar una revisión del Programa de Compliance para verificar que realmente cumplen con los requisitos impuestos por la Ley Orgánica.

Atentamente,

El Departamento de Corporate Compliance de Baker & McKenzie

El contenido de la presente nota tiene carácter meramente informativo. Cualquier decisión o actuación basada en su contenido deberá ser objeto del adecuado asesoramiento profesional.

[Política de Privacidad](#)

Este e-mail ha sido enviado por:
Baker & McKenzie
Departamento Compliance

www.bakermckenzie.com

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Before you send e-mail to Baker & McKenzie, please be aware that your communications with us through this message will not create a lawyer-client relationship with us. Do not send us any information that you or anyone else considers to be confidential or secret unless we have first agreed to be your lawyers in that matter. Any information you send us before we agree to be your lawyers cannot be protected from disclosure.

メールの配信停止をご希望の方は、下記URLからお手続きをお願いいたします。



Legal Alert



6th April 2015

For More Information

Cecilia Pastor
cecilia.pastor@bakermckenzie.com

Jesús Santos
jesus.santos@bakermckenzie.com

Ester Navas
ester.navas@bakermckenzie.com

Tel: +34 230 45 00

Compliance Programs exempt Companies from criminal liability

On March 31, 2015, Organic Law 1/2015, of March 30, amending Organic Law 10/ 1995, of November 23, approving the Criminal Code, has been published in the Spanish National Gazette.

As a consequence of the approval of such Organic Law, the implementation of a Compliance Program has grown from a mere recommendation to become a requirement for all companies who want to do business safely.

Specifically, the Organic Law states that companies will be exempted from criminal liability if they have adopted an organization and management model which includes supervision and control measures capable of preventing such crimes or materially reducing the risk of such crimes being committed, prior to the commission of the crime. That is to say, if they have adopted what is traditionally known as a Compliance Program.

In any case, in order for a Compliance Program to exempt companies from criminal liability, the following must also be complied with according to the Organic Law:

1. The functioning and compliance of the Compliance Program must have been bestowed to a Compliance Officer / Compliance Body with independent powers of initiative and control or which has been legally entrusted with the power to supervise the internal controls of the company. In companies allowed to submit simplified financial statements, these functions may be directly assigned to the board of directors;
2. The individual authors must have committed the criminal offence while fraudulently eluding the Compliance Program, and
3. There must have been no omission or insufficient exercise of the supervision and control functions by the Compliance Officer / Compliance Body.

Additionally, the Organic Law provides guidelines on the requirements that Compliance Programs must meet in order to exempt companies from criminal liability. Such requirements are none other than those already imposed by jurisdictions like the US and the UK:

1. Risk assessment: of the crimes that should be prevented.
2. Standards and controls: to mitigate any criminal risks detected.

3. Financial management system: to be put in place to prevent the identified crimes.
4. Whistleblowing channel: obligation to report to the Compliance Officer / Compliance Body any violation of the Compliance Program.
5. Disciplinary system: to sanction the violation of the Compliance Program.
6. Audits: periodical reviews and adjustment of the Compliance Program to any new circumstances or needs.

The Organic Law will enter into force on July 1, 2015 but, by application of the principle of retroactivity of the most favorable criminal law, in our opinion, all those companies who have been upfront and have just implemented a Compliance Program in the terms described herein, would already enjoy the exemption. However, in such cases, it would be recommendable to conduct a review of the Compliance Program in place to verify that it actually meets the requirements of the Organic Law.

Yours sincerely,

The Corporate Compliance Department of Baker & McKenzie

The content of this alert is intended for information purposes only.
All decisions or acts based on the above should be subject to appropriate professional advice

[Privacy Policy](#)

This e-mail was sent by
Baker & McKenzie
Corporate Compliance Department

www.bakermckenzie.com

Baker & McKenzie International is a Swiss Verein with member law firms around the world. In accordance with the common terminology used in professional service organizations, reference to a "partner" means a person who is a partner, or equivalent, in such a law firm. Similarly, reference to an "office" means an office of any such law firm.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.

Before you send e-mail to Baker & McKenzie, please be aware that your communications with us through this message will not create a lawyer-client relationship with us. Do not send us any information that you or anyone else considers to be confidential or secret unless we have first agreed to be your lawyers in that matter. Any information you send us before we agree to be your lawyers cannot be protected from disclosure.

メールの配信停止をご希望の方は、下記URLからお手続きをお願いいたします。