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Recent Developments in South American Labor Law - Protecting Workers' Rights or Adding to Labor Market Inflexibility?

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This article analyzes important labor law developments in Chile, Peru, Argentina, and Uruguay. In particular, it will focus on (a) discrimination claims in these respective countries and how and when they may arise, (b) trends and new developments in labor law, (c) areas of greatest activity in the respective countries, and (d) M&A considerations, including the acquired rights doctrine, restrictions on outsourcing, and other issues.

Introduction / Comparison with US

One important labor law principle, non-discrimination in the workplace, has historically played a larger role in the US than in South America. Employment discrimination is an important legal theory in the United States, as it creates an exception to the general U.S. rule of employment at will. Under this rule, either party is free to terminate the labor relationship with no liability to the other. However, the modern civil rights regime in the U.S. has re-shaped the rule such that an employer may terminate an employee without liability for any reason that is not illegal.

Of course, the employment at will regime is rooted in a freedom of contract notion in the labor area that South America does not share and this article highlights how the view of equal or unequal bargaining position shapes labor law in South American countries.

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In contrast, South American countries share a more European approach to labor relationships, and terminating these relationships, in the absence of "cause," requires a payment of statutory severance. This more paternalistic view is rooted in the notion of disparate bargaining strength and the need to protect employees who have less leverage. As to the concept of non-discrimination, it would not be correct to say that this workplace principle has not existed in these countries, but rather that historically the concept has not played as important a role. However, we will see how this principle, as well as others, is evolving.

Chile

Role of Discrimination Law

Historically, discrimination claims in Chile have primarily arisen in the context of employment offers and union status. However, during the Bachelet Presidency, Chile adopted a new procedural labor code which grants protection to fundamental rights acknowledged by the constitution. Moreover, Chile recently adopted two non-discrimination laws: (i) one aimed at ensuring equal pay for equal work between men and women; and (ii) a second one which grants protection to people with disabilities. As a consequence of these developments and the higher protection standard for employees, discrimination claims are expected to increase in Chile in the near future.

Trends and New Developments

Chile has adopted important measures to protect fundamental rights such as worker privacy, and in particular in the context of monitoring of e-mails of employees, drug testing restrictions, and the circumstances under which general physical check-ups can be used against an employee.

Chile has also adopted a new procedure for the protection of these fundamental rights called "tutela." However, to date Chilean courts have responded cautiously to these types of cases. For example, the right to damages in a labor relationship where termination

has not occurred is stated in a very general manner and it remains to be seen how courts will rule when these lawsuits arise. In other cases, if a discrimination case involves the termination of a labor contract without cause, as well as a violation of one of these fundamental rights, then the employee may seek up to eleven (11) monthly gross salary payments, in addition to the general statutory severance. Furthermore, if the court finds the termination to be "serious" ("grave") or "discriminatory" ("discriminatorio"), then the employee may ask the court to be reinstated to his former position with the company.

As to the protection of these fundamental rights, Chile applies a three-part test such that any such employer measures must be (i) proportional, (ii) necessary, and (iii) non-discriminatory.

Areas of Greatest Activity

In Chile, labor claims have been mostly related to discriminatory employment offers and union status. However, as mentioned above, pursuant to the new labor Code of Procedure which protects fundamental rights of the employees, it is likely that the number of claims for discrimination in this area will increase. Likewise, according to a law recently enacted concerning equal pay between men and women, it is likely that claims concerning equal pay between men and women will increase.

M&A Considerations

In Chilean M&A practice (as well as the other countries mentioned in this article), unlike the US, it is not possible for a buyer to exclude the labor liabilities of the target company in the purchase of substantially all of the assets of a business by using an asset purchase structure. Rather, in general, the buyer will be deemed a successor for labor purposes and shall be held liable for the labor liabilities of the target company.

It is also important for potential buyers to carefully review contracting or other outsourcing agreements, as well as any other agreements that might be construed as outsourcing (even if they are temporary) for purposes of possible joint and several liability of the target company in relation to liabilities of the workers of the outsourcing supplier rendering services at the target company. In this case, the target company, as the party receiving the benefit of the outsourcing services, has a legal obligation to request the outsourcing supplier to provide evidence of the fulfillment of the labor obligations relating to its employees.

Finally, it is of course important to review executive employment agreements for golden parachute arrangements.

Peru

Role of Discrimination Law

Contrary to the United States, discrimination law has historically not played a prominent role in the Peruvian labor system. Nevertheless, the Peruvian Constitution recognizes an employee's right to protection against discrimination as a fundamental right. To this effect, Peru has ratified the ILO Convention on non-discrimination and its language has become part of Peruvian domestic law. In addition, Peruvian labor law identifies protected categories of workers from non-discrimination on the basis on gender (including a ban on sexual harassment), nationality, race, age, religion, and disabilities.

Finally, as a result of the bilateral Free Trade Agreements ("FTAs") it has recently entered into with the U.S. and Canada, respectively, Peru has substantially increased the Labor Ministry budget for labor inspection and enforcement, increasing the number of labor inspectors from 100 to 400.

Trends and Developments

In addition to the enhanced enforcement efforts arising out of the ratification of the FTAs mentioned above, Peru has also recently enacted new labor legislation, introducing U.S. style oral hearings for the presentation of evidence. These rules are designed to expedite labor lawsuits in Peru by requiring judges in most instances to rule immediately after the conclusion of an oral evidentiary hearing. These reforms, if they accomplish their goals, could transform labor law practice in Peru by expediting cases that historically have dragged on years.

The reform also enacted rules favorable to plaintiffs allowing them to seek interim measures (e.g. seizure of assets, retention of bank accounts, and issuing of provisional bonuses), including some that do not require notice to the defendant. Unions are also granted greater standing to appear in disputes. The new law will be effective in July 2010 and will be implemented throughout the country in stages established by the judiciary.

An important relatively recent development is potential liability arising out of "outsourcing" or contractual matters. In 2008, Peru adopted rules protecting employees from so-called abusive outsourcing arrangements, whereby employees of a contracting or outsourcing company may seek to hold the client company jointly and severally liable for labor obligations if the employees of the outsourcing company are working at the offices or facilities of the client company. However, this joint and several liability is limited in so much as it only applies to statutory benefits, and not to benefits above and beyond what the law contemplates as a minimum threshold of benefits.

In addition, there is also a possibility that personal service contracts, whenever they are extended for too long in time or due to the nature of the work and level of implicated control, could be deemed to be a labor contract, generating additional liabilities.

Areas of Greatest Activity

Work related to the negotiation of collective bargaining agreements continues to be an important area in Peru.

In particular, there is much activity involving lawsuits filed by alleged union delegates based on their protected status and challenging the termination of their labor relationship.

M&A Considerations

The most important type of labor claim in Peru is the claim for equal pay. Equal pay complaints often arise in the context of integrating companies that have recently completed a merger, whereby employees of one of the former companies earn lower salaries for the same or substantially similar type of job and seek to receive the same treatment as the employees of the other company.

In Peru, buyers should also be aware of the acquired rights doctrine. Under this doctrine, employment benefits regularly provided to employees without adequate qualification and conditioning may be deemed to become "acquired rights" as a consequence of the "custom" as a source of labor rights, which may not be subsequently taken away without triggering a constructive dismissal claim.

Argentina

Non-Discrimination

The general principle of non-discrimination is recognized in Argentine labor law, where the discrimination of employees within protected categories (e.g. gender, religion, race, age, disability, physical appearance) is expressly banned. Nevertheless, with the exception of firing union representatives and pregnant or recently married women, the principle of non-discrimination has not historically represented a major part of Argentine labor practice, perhaps due to the generous severance pay granted under law for dismissals without cause.

However, notwithstanding the above, discrimination claims in recent years have grown (albeit not without criticism), such that some observers estimate that almost one-half of the labor claims filed in Argentina invoke a discrimination theory (and in particular discrimination claims on the basis of gender, political views, and health conditions, including AIDS cases).

Interestingly, whistle blowing is not a protected category in Argentina. However, the Congress is currently considering a measure that would prohibit or restrict retaliatory treatment in the workforce against whistleblowers.

Current Trends and Developments

In recent years, the Argentine Congress and the Supreme Court have been very active in the labor law area. One of the most important recent topics is the ability of employees to waive their employment rights.

Curiously, while many governments and companies have been taking measures in Europe and in the U.S. to limit or reduce compensation for executives and to restructure labor costs so as to preserve jobs, Argentina has been moving in the opposite direction by preventing employees as a matter of public policy from waiving any of their labor rights and benefits. Hence, the benefits cannot be reduced, even with the employee's consent, even when the job benefits were unilaterally given and not formally incorporated into an employment agreement. From a policy perspective, this measure clearly adds an additional layer of labor rigidity to the Argentine labor market.

In addition, the Supreme Court recently altered the workers compensation system, ruling that in general employees' rights to seek damages for workplace injuries and sicknesses should not be restricted by a statutory model, citing constitutional and non-discrimination principles.

Perhaps one of the most high profile labor cases was the Kraft case whereby employees in a unit of Kraft Argentina were asserting a wrongful dismissal claim and refused to vacate the premises. The company struggled for three weeks before it could regain control of its property, calling into question basic private property rights in a very politicized matter that reached the top echelon of the Argentine government. However, it is also possible to view this case, not as a dramatic change in the law, but rather as a political tug of war between a dissident group of employees and the government caught in a difficult political situation not wishing to offend an important constituency.

Finally, there is a new legal debate as to the ability of non-certified unions to negotiate on behalf of employees. Interestingly, non-discrimination principles have been invoked in this debate to justify more than one union to negotiate on behalf of the same group of employees in a company.

Areas of Greatest Activity

As a consequence of an active nationwide collective bargaining model, the negotiation of collective bargaining agreements ("CBAs") in relation to matters such as, wages, benefits, and other labor terms and conditions, continues to be an important area in Argentine labor practice.

In general, collective bargaining agreements date as far back as 1975 (immediately before the commencement of military rule in Argentina), and they are still in force under an indefinite term arrangement commonly known in Argentina as "ultra-activity." However, for the older CBAs, new economic terms are typically negotiated annually and in many instances (depending on the industry) at the national level.

Labor litigation arising out CBAs is also very common in Argentina, particularly in cases involving claims for workers compensation, discrimination, overtime, fines for unreported salary, and joint and several liabilities for officers and directors, contractors, etc.

M&A Issues

In Argentina, potential buyers should review the target company's contracts with contractors and other

service suppliers. Argentina also has liberal rules for imposing joint and several liability for labor obligations for "outsourcing arrangements" particularly where the employee can assert his/her activities where controlled by the client company.

Additionally, it is worth mentioning that whenever personal services are rendered on a monthly basis, there is a presumption of fraud to the employment and social security laws, and the existence of a hidden employment relationship. Also, temporary agency workers are very frequently used, but have strict regulations and should be carefully reviewed.

Also, several years ago Argentina adopted a strict data protection law that has recently expanded by the issuance of more specific regulations. These regulations impose a very demanding, European style, high level of protection to employees in this area.

Finally, in any due diligence review in Argentina, potential buyers should look beyond the formal papers and try to identify potential acquired rights liabilities (in the form of preexisting and consolidated labor rights of the target's employees).

Uruguay

Non-discrimination

In Uruguay, although the country has a very protective system for employees (similar in that respect to other countries analyzed in this article), discrimination claims have not historically played an important role within its labor law model. Rather, the most important labor principles are: (i) labor subordination or control; (ii) employees cannot waive their labor rights; and (iii) reality over form, by which courts will examine the actual facts and circumstances of a case over what formally appears in a contract.

Salary boards were created in 2005 after a new left of center coalition took power (curiously, Uruguay historically had little collective bargaining legislation). These boards are tripartite bodies, consisting of representatives of the State, employers, and unions and are responsible for setting employee salaries in sectors of the economy and job categories. Moreover, since the enactment of The Collective Bargaining Act of 2009, these agreements are now registered with the Ministry of Labor, making them quasi-legislative acts and applicable to the whole sector.

In addition, in January 2008, Uruguay adopted Law No. 18,250 which afforded to foreign workers the same labor rights and protection that citizens of Uruguay enjoy.

Trends and Developments

As mentioned above, Uruguay has historically not had extensive collective bargaining legislation, with collective bargaining growing notwithstanding this statutory vacuum. However, in recent years, this has changed, and new legislation in the labor and employment area has been adopted. For example, in September 2009, Uruguay adopted Law No. 18,566 which was the country's basic collective bargaining act and established the fundamental rights to collective bargaining. In addition, in the same month, Uruguay also adopted Law No. 18,572, which established a new labor procedure, and to this effect bifurcated labor claims in cases for low amounts in controversy (i.e. US$ 4,000) whereby expedited proceedings are used, and cases in excess of that amount. Finally, Uruguay has adopted legislation regulating outsourcing so as to protect employees from delinquent employers (Law No. 18,099 of January 24, 2007 and Law No. 18,215 of January 6, 2008). Finally, in September 2009, a new law on sexual harassment was adopted, which among other things, made it easier to claim various types of damages for harassment in the workplace, including but not limited to, a claim for constructive dismissal.

Areas of Greatest Activity

During the past two administrations, collective bargaining has been strengthened in Uruguay. As a result unions and rank in file memberships have grown dramatically. Some employers attempted to fight this development, often by firing new union leaders. However, these employees and their unions usually successfully challenged the dismissal, citing their protected status.

The moment in which union representatives gain protected status can be a difficult issue for employers. In fact, the law is quite broad in its definition of who is a union representative. Generally, it is sufficient that such person has been designated internally by the employees of the company, even before registering the new Union at the Central Union.

M&A

With respect to labor issues in an acquisition context in Uruguay, potential buyers should review both individual and collective labor aspects of the target company. To this effect, any legal due diligence should review the following labor aspects:

a) ***Individual Labor Relationships.*** Buyers should review hiring methods, job categories, the salary system and related job levels, the established workday of the target company, daily and weekly breaks, legal benefits, and benefits not required by law (i.e. non-statutorily mandated benefits, whether from individual contracts, collective bargaining agreements, or custom).
b) ***Labor Related Documents.*** Buyers should review that the target company has complied with its labor record-keeping requirements (i.e. payroll and labor registry book).
c) ***Collective Labor Relations.*** Buyers should review the operation of the applicable unions, union facilities and privileges, conflict prevention methods, and conflict resolution procedures.
d) ***Outsourcing.*** Buyers should review outsourcing arrangements that may represent labor and/or social security contingencies.
e) ***Litigation.*** Buyers should request from the Judicial Office for Allocation of Matters information about

legal actions filed against the target company in order to identify possible labor contingencies.

Finally, in accordance with the tripartite Declaration issued by the International Labor Organization (ILO) in 1977, parties in an M&A transaction should notify the affected unions a reasonable period in advance of the closing. Although this Declaration is not applied so harshly in Uruguay, it is considered advisable.

Conclusion

The continuing growth of labor protections in South America raises new and ongoing challenges to existing businesses and potential buyers. Many of these contingencies do not appear on a company's balance sheet, heightening the importance of a thorough legal due diligence to complement the financial review. From a policy perspective, one wonders if these ongoing steps in the direction of a more inflexible labor market serve the interests of the people they are ostensibly designed to protect. As the recent experience in Spain has shown, rigid labor markets make businesses reluctant to resume hiring after a recession (and in general for that matter) and promote the development of a parallel black labor market, in which case such employees do not enjoy the same labor rights and privileges and payroll taxes are not collected. Moreover, the loss of innovation and productivity is another troubling outcome from inflexible labor markets.

South American Labor Issues

Types of Illegal Discrimination Practices and Related Concepts

Country	Harass-ment	Gender, Nationality, Race, Age, Religion	Political Beliefs	Union Status	Physical Appearance and Disabilities	Whistle-blowing	Most Frequent Claims	Existence of Class Actions	Remedies
Argentina	Yes	Yes	Yes	Yes	Yes	No	Union status and equal pay complaints	In general, no class actions except for union representative reinstatement.	Re-instatement, severance, mental distress, moral damages. No punitive damages.
Chile	Yes	Yes	Yes	Yes	Yes	Yes	Claims have been mostly related to discriminatory employment offers and union status. However, pursuant to new labor Code of Procedure which protects fundamental rights of employees, it is likely that number of claims for discrimination will increase. Likewise, according to a law recently enacted concerning equal pay between men and women, it is likely that claims concerning equal pay between men and women will increase.	Labor class actions do not exist in Chile. Hence judgments as claims are applicable only to the plaintiffs who submitted the relevant claim, except in the event of complaints filed by unions, which have effect over all the members of union.	Administrative fines, reinstatement, moral damages, cease and desist order.
Perú	Yes	Yes	Yes	Yes	Yes	Yes	Union status and equal pay complaints	No	Reinstatement, administrative fines, civil or labor damages, temporary closing of the company, and disciplinary punishment to the harassing party.
Uruguay	Yes	Yes	Yes	Yes	Yes	Yes	Union status and equal pay complaints	No class actions except for union representative reinstatement	Reinstatement only for union representatives; special dismissal compensation; moral damages and administrative penalties.