



# Latin American briefings

a special supplement to *ACC Docket*  
sponsored by Littler Mendelson, P.C.

## Critical Employment Law Issues to Consider When Doing Business in LATAM

By Johan Lubbe ([jlubbe@littler.com](mailto:jlubbe@littler.com)), Monica Schiaffino ([mschiaffino@littler.com](mailto:mschiaffino@littler.com)),  
Renata Neeser ([rneeser@littler.com](mailto:rneeser@littler.com)) and Rogelio Alanis ([ralanis@littler.com](mailto:ralanis@littler.com)), Littler Mendelson, P.C.

With Brazil and Mexico ranked among the top 20 economies in the world and Peru as the ninth fastest growing economy, multinational corporations have expressed renewed interest in Latin America (LATAM) for business expansion and directed foreign investment. The LATAM market is an attractive investment destination due to low labor costs, resource richness and a young expanding consumer market. The regulation of the labor market, however, is strict and inflexible. American decision-makers who oversee operations in LATAM should carefully review local regulations to ensure compliance and avoid potentially costly errors.

This article highlights the critical employment law issues for American corporations with business operations in LATAM.


### Different countries, different regulations

No uniform LATAM-wide law exists. There are some reciprocal benefits among the different jurisdictions in the region. For instance, Mexico shares labor-wise privileges for border employees from Guatemala and Belize; the Southern Common Market (Mercado Común del Sur or MERCOSUR) — a South American regional alliance among Argentina, Brazil, Paraguay, Uruguay and Venezuela —

- 1 Critical Employment Law Issues to Consider When Doing Business in LATAM  
By Johan Lubbe, Monica Schiaffino, Renata Neeser and Rogelio Alanis
- 9 ANADE's Role in Advancing the Legal Profession in Mexico  
By Lillian Moyano Yob
- 13 Ambush Marketing  
By Jorge Otamendi and Fernando Hofmann

Interested in authoring for  
*Latin American Briefings*? Visit  
[www.acc.com/accdocket/edguide.cfm](http://www.acc.com/accdocket/edguide.cfm),  
or contact Assistant Editor  
Brent Thomas at [thomas@acc.com](mailto:thomas@acc.com).

# Global Employment Law Solutions



Littler serves an expanding list of global clients that operate across borders. With a strong presence in North, Central and South America, we represent management in all aspects of employment and labor law, serving as a single source solution provider to the global employer community. Littler is consistently recognized in the industry as a leader and innovator in the future of employment law.

For more information on Littler's global capabilities visit [www.littler.com](http://www.littler.com)

*Littler Global is the collective trade name for an international legal practice, the practicing entities of which are separate and distinct professional firms.*

**Littler**  
GLOBAL

has several international agreements and treaties that encourage jurisdictional cooperation among the member parties. Some LATAM countries have treaties to avoid double-taxation with non-LATAM countries.

Despite the above, and although most LATAM countries share culture, language and historical background, labor and social security matters are often politically driven by the particular social needs of each state. Understanding the local regulations, the decisions of the local labor courts and the prevailing social-political climate are critical. Even then, a simplified uniform approach to workplace matters across the LATAM is not always possible.

### Options for lawful outsourcing are limited

In many foreign jurisdictions, outsourcing is a useful option for corporations to obtain expertise without incurring infrastructure costs and payroll expenses. However, in LATAM, the opportunities for lawfully using outsourced services are limited. When lawful, outsourcing is strictly regulated with substantial penalties for non-compliance. Mexico and Venezuela have strict regulations regarding outsourcing when it is used to disguise a labor relationship. Costa Rica, Guatemala and Uruguay have agencies that serve as job intermediaries to facilitate an individual's access to better quality jobs, but with an unclear social security structure. Colombia currently allows outsourcing, but as the Colombian government is in ongoing negotiations with the United States for a free trade agreement, it has started applying stricter controls, such as requiring an agreement for specialized services to justify the use of outsourced personnel rather than in-house employment.

Although Brazil — along with most of the LATAM jurisdictions — is a civil law country, no statutory law specifically regulates outsourcing. The lower labor courts and the Ministry of Labor and Employment primarily rely upon a consolidated guidance (a *súmula*) of the Superior Labor Court of 1993, as amended in 2000 and 2011, in which the Court held that

outsourcing is illegal in principle, unless the outsourced work is related to security, cleaning or specialized services, such as IT. Accordingly, the outsourcing of a business's main or core business activity would be illegal. However, it is permissible to outsource work, including main or core activities, through a registered temporary employment agency in compliance with the applicable law. The Court's guidance provides no clear definition of what constitutes a "main or core" business. Use of outsourcing is widespread in Brazil, but with the legal uncertainties, it is the source of numerous individual complaints to the labor courts and recent multimillion dollar awards against many renowned multinational companies for collective moral damages.

### Use of independent contractors is restricted

In LATAM, the consequences of misclassifying an employee as an independent contractor are severe: The employee will be entitled to labor benefits and protections under local labor laws, as well as substantial penalties, fines and interest.

In most jurisdictions, an independent contractor arrangement is only valid when the relationship satisfies the following requirements, among others: (a) the contractor has his own human and material resources to render his activities; (b) the contractor does not receive orders from the contracting party as to where, when and how the services must be rendered; (c) there is no economic dependency between the parties; and (d) the contracting relationship is not covering up an actual labor relationship.

When legal entities render services as independent contractors, most LATAM countries make the beneficiary of the services (i.e., the principal to the independent contractor arrangement) jointly and/or severally liable for the independent contractor's employees. This issue is frequently discussed and has led to many lawsuits in Brazil.

## Group companies and their role in employment and labor

The labor laws of all LATAM jurisdictions are extremely protective of employees. Local law readily extends labor and employment liabilities not only to the employer of record, but also to companies of the same group that benefit from the services of the employee.

In Mexico, for instance, labor courts can hold multiple legal entities accountable for the same transgression if they are considered to be part of an economic unit, meaning they jointly benefit from the services of an employee or are related and pursue a common business objective. This has led to numerous contradictions and uncertainty for companies operating in Mexico. For example, if a manufacturing company has a sister company that provides the workforce for the manufacturing company, the companies are: (1) related, and (2) pursuing a common business objective — thus, they are considered an economic unit. Both companies will be jointly liable for the labor and employment obligations to their workforce.

In Venezuela, case law treats a corporate group as an economic unit and, therefore, as a sole company for judicial purposes, including for the payment of damage awards against any of the group companies. Likewise, in Colombia, a group of economically dependent business entities engaged in similar, related or complementary activities is also treated as a sole company. The main purpose of this determination is to avoid inequality among employees hired by two different legal entities. Therefore, if the labor benefits of these related entities are similar, the risk of both companies being considered an economic unit is reduced.

Brazilian law provides that companies of the same economic group as an employing entity are jointly liable for any employment-related liabilities, even in the absence of economic dependence between the companies.

## The need to carefully word hiring documents

Issuing an American-style offer of employment to an employee in LATAM could result in unintended benefits to the employee. For example, many of the LATAM jurisdictions require payment of a 13<sup>th</sup> check (or Christmas bonus) to employees. A simple statement in an offer letter about “annual” salary, therefore, should expressly state that the annual salary includes the 13<sup>th</sup> check. Otherwise, a statement that “your annual salary will be \$120,000” would effectively mean an annual salary of \$130,000 to account for the mandatory 13<sup>th</sup> check of \$10,000. Further, in Colombia and Peru, the employer can only state an annual salary that includes statutory benefits if the employee’s salary will be above a certain threshold. In most LATAM countries, it is mandatory to include the exact working hours and schedule of the employee, and many positions that would be considered exempt in the United States are not in LATAM. When drafting offer letters, consider removing any references to employment at-will, because none of the LATAM jurisdictions recognize that doctrine.

## Implementing global human resource policies in LATAM

Several barriers limit the as-is implementation of foreign-company policies and corporate documents in LATAM jurisdictions. These barriers include language, governing laws, local regulations and culture.

First, corporate policies, documents and practices should be localized or — as it is called in this part of the world — “tropicalized.”

Localization of policies and practices requires: (1) translation into the local language (Spanish or Portuguese) to minimize the risk of being misunderstood or having the policies qualified as “invalid” by a labor court; and (2) significant adjustments to account for local culture and laws. For example, policies governing employment at-will, mandatory labor benefits and procedures for disciplining employees should be carefully revised to meet local minimum statutory requirements.





Second, the local LATAM company and its parent company or corporate group should maintain an arm's length relationship. Open, direct control of local employees by the parent company abroad may be sufficient evidence to render both companies the employer of the local employees, since subordination is a key element in assessing labor relationships in LATAM. Also, all documents used by the LATAM company should bear the logo and name of the actual local employer. Merely rolling out corporate documents that bear the logo of a parent company could create a relationship between the parent company and the local employees. Accordingly, US companies should avoid controlling the processes, policies and documents of their LATAM subsidiaries and related entities, since doing so may inadvertently create liabilities for the parent company.

### Governing laws – extraterritorial application of some LATAM laws

A conventional choice-of-law provision in an employment agreement will be unenforceable throughout LATAM. The law of the place of employment will govern regardless of factors such as the parties' nationalities, the place where the agreement was executed or where the salary is paid. Further, in some instances, local LATAM laws protect the employment relationship even if the service is rendered outside that country. The Expatriate Law of Brazil is a good example of the extraterritorial application of local law. That law provides that a Brazilian employer must continue to contribute to Brazil social security and the Brazilian savings fund (FGTS) on behalf of employees who are transferred to work abroad for a company of the same group, and such employer may be responsible for any shortcoming in compensation while abroad, and moral damages for excessive working hours.

### Data privacy and human resource information

Data protection laws are somewhat new in LATAM. Most LATAM jurisdictions have constitutional-level provisions concerning

data privacy, but a few countries (Argentina, Chile, Colombia, Costa Rica, Mexico, Peru and Uruguay) have passed EU-styled comprehensive data privacy laws in the last few years. Employers should be careful about how they process employees' data in the region.

There is no regional treaty that regulates the collection and cross-border transfer of personal data within LATAM. Argentina has been recognized by the European Commission as the only LATAM country with an adequate level of personal data protection. Thus, Argentina has become the main recipient of personal data transferred from EU to LATAM. Mexico's Data Protection Law requires that any cross-border data transfer must be made with consent of the data subject. Article 37, Section III, however, gives some relief for groups of companies — i.e., when the cross-border transfer of personal data is made among controller entities, subsidiaries or affiliates, no special or specific consent is required.

### Managing employee performance

In most LATAM countries, employers cannot discharge employees for poor performance, although the employer may otherwise discipline the employee. As a general rule, termination for unsatisfactory performance would not constitute "good cause" for termination, as is required under most LATAM labor laws. Colombia is an exception to the general rule. Under Colombian law, employers may terminate an employment relationship for unsatisfactory work performance if an employee fails to improve within a reasonable period after being warned about his performance issues.

Many LATAM jurisdictions allow trial periods for new hires in which the employer can evaluate a new hire's performance. Once the new hire passes the initial probation period, the employer assumes the risk of continued employment in the same way it assumes other business risks.

An employer is not required to obtain an employee's authorization to conduct a performance evaluation during the course of employ-

ment. However, the employer should consider letting such employees know they are being evaluated, and provide them with feedback and the opportunity to improve. Local managers in LATAM frequently are reluctant to provide candid evaluations of their direct subordinates, because the underperformance of their subordinates may affect the parent company's view of the managers' own performance. Employers should consider providing regular training to managers and supervisors to minimize the potential consequences of such hesitancy.

### A complex termination process

In general terms, there are four causes for lawful termination of an employment relationship in LATAM: (1) dismissal (employer's action, either for cause or without cause/wrongful termination); (2) employee's action (resignation or constructive dismissal); (3) mutual agreement; and (4) fortuitousness/cause majeure. The definition of just cause is generally consistent throughout the LATAM countries.

All LATAM jurisdictions impose mandatory severance pay for wrongful terminations. Generally, it is very difficult to discharge an employee for cause, since the employer must prove the employee's misconduct before the labor authorities. Accordingly, employers usually elect to pay the steep severance and simply terminate the employment relationship without cause. In Brazil, for instance, most terminations are characterized as without cause, and the employers pay the mandatory severance, since almost all terminations for cause end up in litigation.

Employers should also be mindful of the termination procedure. Certain LATAM countries require the approval of the local labor authorities before terminating an employee. Outside Brazil, the common practice throughout LATAM is to execute a termination agreement between the parties and file the agreement with the labor authority for approval.

However, even if the labor authority approves the termination agreement, the employee will not necessarily be barred from filing a complaint. Should that occur, the employer will be able to submit the termination agreement showing that it was approved by the labor authorities.

### General release of claims is usually unenforceable

General releases of claims are unenforceable in some LATAM countries. A carefully drafted termination agreement, however, could achieve close to the same result, if, for example, the termination agreement itemizes the payments being made, allocates a reasonable amount to each potential claim, and includes the employee's affirmative statement that no further payments are due by the employer.

In Brazil, a private termination agreement with a full release of claims is not enforceable. Under Brazilian law, upon the termination of employment, the parties must execute a state-issued form itemizing all termination payments. This standard form serves as a receipt for those specific payments. Any unpaid or underpaid compensation or benefits can subsequently be claimed in court, and a payment made under a termination agreement might not be taken into consideration to offset the awards.

In summary, the LATAM employment and labor regulations are complex. Decision-makers should be careful when hiring, managing and discharging employees in LATAM. Also, managing from afar could impute local liabilities upon a foreign corporation. Check, recheck and do not rush in. "Mañana" is a common saying in the region for a reason! **LAB**