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Employment claims in the US are on the up, and Latin American governmental employers there are far from immune to the rise in labour litigation. Littler Mendelson's Rebecca Aragón and Lucas Muñoz explain how they can minimise their exposure


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Employment-related litigation, whether brought by individual employees claiming discrimination or as class actions for wage and hour violations, continues to rise in the US, particularly in states such as California and New York. Latin American governments employing US citizens or legal residents in their consular and embassy offices in the US will most certainly be affected by this rising trend for one basic reason: Latin American governments are significant employers in the US. According to the US State Department's Spring/Summer 2011 report entitled "Foreign Consular Offices in the US", there were almost 400 Latin American consular-related offices across the country, in addition to the many Latin American embassy offices in Washington, DC, and other cities. The numbers are sizeable. Mexico tops the list with over 80 such offices, and Guatemala is next with 31 consular-related offices. Nineteen other Latin American nations have numerous consular offices, and in the aggregate, employ thousands of individuals in the US.

In light of these numbers and the rising trend in employment litigation, Latin American governments, as sovereign employers in the US, should position themselves to take full advantage of certain rights and preventative measures available to them to reduce the likelihood that they will have to grapple with employee-related claims in the country.

Latin American governmental entities operating in the United States may be surprised to learn they could be immune from civil lawsuits brought by their employees in the US. The Foreign Sovereign Immunities Act (FSIA) grants all foreign sovereigns, their agencies, and instrumentalities immunity from suits in US courts unless one of its limited exceptions is applicable. The FSIA's scope is relatively broad. By definition, it extends not only to foreign governments but also to any agencies and instrumentalities of a foreign sovereign, including nationalised commercial enterprises, such as oil companies or airlines. There are exceptions to this immunity, however, and the one most often claimed in employment lawsuits is that the employee is engaged not in civil or governmental service, but solely in "commercial" activity. Whether the foreign sovereign employer is immune from suit, or whether it is instead engaged in commercial activity is determined by "reference to the nature of the course of conduct or particular transaction or act", rather than by reference to such employer's purpose. Courts have the discretion, on a case-by-case basis, to determine what conduct constitutes commercial activity for purposes of this exception.

The legislative history of the FSIA offers some guidance on whether an employment relationship would be considered commercial, stating "diplomatic, civil service, or military personnel" would not be considered commercial employees, but "labourers, clerical staff or public relations or marketing agents" would be. These descriptions are not as straightforward as they may appear. Many seemingly "civil servant" employment relationships enter a grey area.

This is due largely to the fact that the FSIA immunity exceptions are not typically applied based on employment classification or title, but rather based on the nature of and purpose of the position, and what job duties the employee actually performs.

Different interpretations

For a Latin American governmental employer, the assessment of risk and determination of whether it is immune from a civil lawsuit brought by one of its employees requires a very fact-driven analysis. For instance, in Yuka Kato v Shintaro Ishihara, Governor, the plaintiff was employed by the Tokyo metropolitan government to attend various trade shows and promote the products of various Japanese companies. In determining whether her sexual discrimination suit was barred by the FSIA, the panel of the US Court of Appeals for the Second Circuit focused its analysis on whether the governmental employer was exercising only those rights of a commercial enterprise, or whether it was performing other work which could only be characterised as civil service. While the court acknowledged attending trade shows and promoting products appeared to be commercial activities that any company might do on its own behalf, the fact that the Tokyo metropolitan government promoted the products of many different companies because they were Japanese was not something a typical commercial entity would do. Likewise, it was important for the court that the plaintiff had taken a civil service exam and was classified as a civil servant under Japanese law. On these facts, the Second Circuit determined that the Tokyo metropolitan government was immune and dismissed the plaintiff's lawsuit.

In another case, Holden v Canadian Consulate, a panel of the US Court of Appeals for the Ninth Circuit came to the opposite conclusion with similar facts. Similar to the Kato case, the plaintiff in Holden was employed to promote various Canadian products. But the Ninth Circuit took a much more restrictive view than the Second Circuit in determining what constituted "civil service." The Ninth Circuit decided that the plaintiff was not a civil servant or diplomatic staff member because she did not pass a civil service exam, did not receive tenure as a civil servant and did not have the ability to act on behalf of the Canadian government. Although her work made her part of the consulate staff – and, like the plaintiff in Kato, she was primarily responsible for marketing and promotion of Canadian products and businesses – the Ninth Circuit declined to apply FSIA immunity to the suit because the plaintiff's work did not rise to the level of policy-making, lobbying activity or legislative activity.

To decide if the commercial activity exception applies, some courts, like the Holden court, have relied heavily on the distinctions between civil servants and other support personnel. Other courts analyse both the civil servant classification and the nature of the activities. As seen from the variety of decisions, the availability of the FSIA immunity protection in employment claims is not guaranteed.

The cost of getting FSIA immunity wrong

For Latin American governmental employers in the US, determining whether the FSIA applies has enormous implications. For employees not performing sufficiently diplomatic or civil servant related job duties, Latin American governments will have to ensure they comply with a myriad of federal, state and local city or municipal employment laws. In addition, many states have additional employment statutes that either reinforce the protections provided by federal law, or in many cases provide additional protections often in favour of the employee.

Failure to comply with employment statutes can be costly. The primary federal anti-discrimination statute, Title VII, permits awards for front pay, damages of future earnings, other compensatory damages, back pay, injunctive relief, and attorneys' fees and costs. Other discrimination statutes such as the Age Discrimination in Employment Act and the Equal Pay Act permit the award of unpaid wages and liquidated damages. For seemingly innocuous wage and hour laws, class actions may cumulate small damages and repeatedly applied penalties to establish liability in the tens of millions. In addition, state law claims can be pursued concurrently with federal law claims. And almost all

employment statutes provide a successful employee with the right to recover attorneys' fees, which by themselves can mean monetary exposure of over US$500,000 in, for example, class actions, should the case proceed to trial.

Assessing the cost of employment litigation is not limited to calculating monetary damages. Employers may be required, among other things, to reinstate the employee. And needless to say, the employer may incur significant administrative and litigation related costs for lawsuits that often span months (or years) and expose foreign sovereign employers to negative publicity and media coverage.

Minimising the risk

Foreign sovereign employers operating in the United States are often unaware of such employment law issues or how such laws apply to them. For Latin American governmental entities employing US citizens, effective risk management strategies must include both prevention and protection strategies.

The best way to protect against potential lawsuits is to prevent them before they happen. For Latin American foreign sovereign employers in the US, this will mean adopting a practice that has become increasingly familiar to large private employers: the audit, which many companies doing business in the US have adopted as an effective tool to reduce the risk of costly lawsuits. Independent audits of payroll and timekeeping data are conducted to ensure that the employer complies with federal and state wage and hour laws, including overtime exemption and pay calculation requirements, and meal and rest break laws, where applicable. But for foreign sovereign employers operating in the US, a civil service audit may also be advisable. Determining which employees are performing a civil service function gives the employer an understanding of which laws apply to which employees. Such an audit would include a review of all job descriptions, job responsibilities, and actual activity performed by all staff that may arguably be serving a diplomatic function. Clearly defined roles and responsibilities will help avoid situations where employees cross the line between diplomatic and commercial duties, thereby exposing the sovereign employers to liability for claims under US employment laws. An audit may reveal steps that can be taken to more clearly establish that employees should be covered by FSIA immunity.

For non-civil servant or commercial employees, Latin American foreign sovereign employers should consider adopting strategies used by other US employers. In the US, most employment relationships are "at-will," meaning both the employer and the employee may terminate the employment relationship at any time with or without cause. For commercial US employees, employment contracts provide additional unnecessary risk and foreign sovereign employers may be advised to phase out employment contracts for those employees. Instead, these employers may consider implementing employee handbooks and policies typical of other US private employers.

There is one contract which is highly advisable in the US: the arbitration agreement, which has quickly become a favoured tool among private employers in the US. Arbitration is usually a less costly and faster method of resolving problems in the workplace than traditional litigation. In addition, although there may be a limited degree of public distribution of an arbitration award if any, there is no question that arbitration offers a greater potential for privacy than the public courtroom. Another benefit is that an arbitrator chosen by the parties can result in more predictability insofar as the ultimate results are concerned because an arbitrator's previous decisions in prior similar disputes are typically available, and can provide insight into how he or she decides a case. Finally, although the enforceability of class action waivers continues to be an active issue in US courts, under the current legal landscape after the US Supreme Court's decision in AT&T Mobility v Concepcion, sovereign employers may well be advised to have employees sign arbitration agreements with class waivers as a way to potentially limit the risk of costly class action lawsuits. For foreign government employers, however, all arbitration agreements must be carefully drafted and should be coupled with a civil service audit, as arbitration can be a separate exception to the FSIA. Of course, a careful examination of each Latin American foreign sovereign's policies, customs, employee

contracts and, if applicable, treaties with the US, must be examined before implementing an arbitration agreement or the other preventative measures addressed in this article.

Latin American governmental employers often face uncertainty when they attempt to defend themselves from costly employment claims brought in US courts. Aside from the audits and arbitration agreement discussed in this article, there are many other preventative measures foreign sovereign employers should consider (including anti-harassment training and employee policy revisions), particularly since the FSIA may not provide immunity against all employee-related claims.