

# The Art of Terminating an Expat in Latin America

By Roberto E. Berry, Esq.



## Introduction: The U.S. Multinational Expat Context

**W**HEN U.S. MULTINATIONAL COMPANIES send their employees—commonly known as expatriates, or “expats”—on assignments in Latin America and the corporation subsequently terminates the employee, the corporation may be exposed to wrongful termination liability in the foreign jurisdiction. Imagine, for example, the U.S. multinational corporation that learns that one of its expats in Latin America engaged in significant wrongful conduct, perhaps embezzlement. The decision-makers delay over a month to review the information and decide to terminate the expat. The expat program director then calls the expat, who admits the wrongdoing, and orders the expat to return to the U.S. headquarters for his last paycheck. The paycheck includes all salary due since the last paycheck until the day of termination and all other reimbursements or accrued benefits, but fails to include severance premiums. Even this seemingly fully justified termination exposes the corporation to legal dangers under foreign law. This article focuses on these dangers and discusses ways for U.S. corporations to avoid liability, at least with respect to expats assigned to Latin America.

## The Expat’s Knowledge of Local Laws

THE VERY NATURE OF THE EXPAT’S ROLE abroad increases the risk of liability. Expats become familiar with Latin American labor protection laws. The typical expat undertakes management responsibilities that usually include hiring, compensating, promoting and terminating local employees. The expat then learns about nationalized health care benefits, premium vacation pay, guaranteed year end bonuses, compulsory profit sharing, and restrictions against the firing of employees that are common throughout Latin America.

When the expat is terminated without severance compensation, as in the situation above, the expat will likely remember that the labor protections under foreign labor law may exceed the rights he may have under U.S. law, and will consult foreign counsel to see if he may benefit from those protections.

## Indemnification Compensation

PERHAPS THE MOST SIGNIFICANT LATIN AMERICA labor law protection is the right to a severance payment for terminations without

cause. Unlike in the U.S., a termination without cause or for convenience in Latin America constitutes a wrongful termination *per se*, for which an employer is forced to pay severance. This entitlement, which is usually called “indemnification,” statutorily mandates the amount that must be paid as severance payments in these cases. In Argentina, for example, indemnification is equivalent to one month of salary per year worked.<sup>1</sup> In Brazil, a terminated employee is entitled to monies deposited by the employer in the Guaranty Fund for Length of Service (currently 8.5% of all salaries paid to the employee over the length of service),<sup>2</sup> plus a premium of 50% on such amounts if the dismissal is without cause.<sup>3</sup> Mexican labor law entitles a worker dismissed without cause to three months’ salary, plus twenty days’ salary per year worked.<sup>4</sup> In addition, in Mexico a plaintiff who ultimately wins a labor case also has the right to full salary for the duration of any wrongful termination litigation, even if the plaintiff finds another job the day after filing suit.<sup>5</sup> These indemnification formulas do not provide for million dollar recoveries, but they can still provide substantial compensation to the employee, especially when employee has a significant length of service with the company.

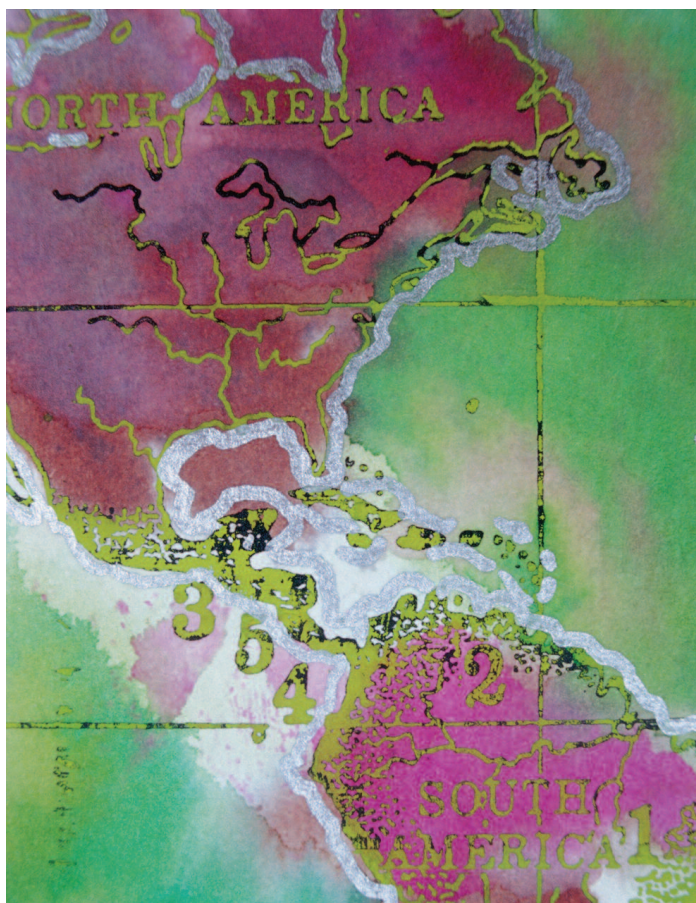
“The very nature of the expat’s role abroad increases the risk of liability.”

## Restrictions on Terminations for Cause

INDEMNIFICATION IS NOT, HOWEVER, due when an employer can demonstrate that the employee was terminated for just cause. Latin American labor laws, however, limit the types of conduct that qualify as cause for termination to acts of dishonesty, violence, unjustified absences, violations of confidentiality obligations, drunkenness on the job, and similar behavior.<sup>6</sup> These conduct classifications may not materially differ from what is considered cause in U.S. terminations, but the list is not open-ended, and employers must generally bear the burden of proof of showing cause to terminate in con-

formance with the statutory framework.<sup>7</sup> Most notably, an employee's simple underperformance, without more, would probably not constitute just cause to terminate.

Even assuming the employer learns of employee conduct justifying termination, the Latin American doctrine of "immediacy" requires the employer to promptly terminate the employee after the offending conduct or else be deemed to have forgiven the employee's offense.<sup>8</sup> Immediacy inquiries are typically decided on a case-by-case basis, but as a rule of thumb, imme-



diacy requires termination within one, two, or three months, and further delays prejudice the employer's right to terminate the employee.<sup>9</sup> Mexico has further codified the principle of immediacy and requires the employer to terminate the employee within one month of learning of the cause to terminate.<sup>10</sup>

Mexican law poses yet another procedural hurdle for the employer. Although Latin American labor codes commonly require an employer to provide employees written notice of the causes for termination, Mexican employees have a right to accept or reject the notice.<sup>11</sup> If the employee rejects the notice, the notice must be presented to the local labor board within five business days following the termination.<sup>12</sup> Failure to follow the procedure is fatal and "by itself, will be sufficient to consider the termination wrongful" as a matter of law,<sup>13</sup> thereby forcing the employer to indemnify the former employee.

Compliance with these technical rules becomes problematic where the termination involves expats if the expat is able to convince a foreign court that its labor law applies. For example, if we apply Mexican law to the opening hypothetical situation where the expat's embezzlement is undeniable, the U.S. corporation would still be liable for having wrongfully terminated the employee. The termination occurred more than 30 days after the employer knew of the offense, which violated Mexico's immediacy statute, and the employer failed to give proper notice to the employee prior to termination.

Although these problems can be avoided if experienced local Human Resource (H.R.) personnel handle the termination, this is not the typical practice for expat terminations. Usually H.R. personnel in the corporation's home office supervise the termination. This practice is primarily rooted in the reasonable, but erroneous expectation that only U.S. law applies to expats. It may also be due to the fact that foreign H.R. representatives are usually not familiar with the salaries and benefits of U.S. personnel. Whatever the explanation, the

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practice is risky because U.S. H.R. personnel, acting without foreign assistance, will probably not know how to navigate foreign termination procedures to ensure compliance with all applicable requirements.

### Structure of the Expat Claim

THE THRESHOLD QUESTION IS whether foreign law protects the expat. The answer seems to be yes. Latin American constitutions generally extend their scope of protection to all persons within the territory, nationals or foreigners alike, and guarantee these people the right to work.<sup>14</sup> Thus, the worker who systematically renders services within the territory of the foreign country, including the

expat, is entitled to protection of the labor laws regardless of the employee's citizenship or immigrant status.<sup>15</sup>

Assuming that expats are protected under foreign labor laws, the logical defendant is the U.S. employer. In Latin American jurisdictions, however, an employment relationship typically exists if (a) one person performs services in a subordinate role to another, and (b) that person receives payment from the other.<sup>16</sup> In the typical expat situation, the expat can easily

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meet both prongs of the test with respect to the U.S. multinational corporation. But to avoid the complications of international litigation, such as international service of process and taking of evidence abroad, the employee plaintiff may also look to sue the foreign subsidiary. The expat would have difficulty showing clear subordination to, or payment from, the foreign subsidiary, but statutory language common in Latin American labor regimes exists that would seem to grant an expansive court the ability to reach the foreign subsidiary. Some statutes disregard corporate veils amongst all entities that support the economic unit of productive activity, making all related entities potential employer defendants.<sup>17</sup> On occasion these statutes plainly provide for joint liability between any of the members of a corporate family.<sup>18</sup>

### Preventive Measures

THERE ARE PRACTICAL MEASURES a U.S. company can take to reduce or eliminate exposure from expat claims that arise solely out of the U.S. company's non-compliance with the technical rules of foreign labor law.

The first practical measure is to discourage the filing of any such claims by placing contractual protections in the expat's employment or expat assignment agreement. The measures can include (a) a choice of law clause in the expat's employment contract that provides that all matters relating to the employment shall be governed by U.S. law, and (b) a set-off clause that provides that if the expat receives any recovery from a claim filed abroad against the U.S. employer or its affiliates, such recovery shall be set-off against any U.S. compensation or benefits accruable to the expat at termination.

The effect of such clauses, however, is not guaranteed. While an expat may think twice before filing a claim abroad if

this might jeopardize his or her U.S. benefits, courts in Latin America may reach the conclusion that the clauses are null and void. Labor laws in Latin America are generally considered of public order, meaning that they set forth unwaivable protections.<sup>19</sup> From the Latin American labor court's perspective, a choice of law clause that would deprive a wrongfully terminated employee of the right to indemnification could be stricken as a threat to public order and policy.



The second practical measure is to implement diligent record keeping procedures that monitor expat activity. An expat file should include materials that evidence the employment link with the U.S. company and the temporary nature of the assignment abroad. The first type of documents would include, but are not limited to, an employment agreement with the U.S. home office, a description of U.S. salary and benefits that can be shown to apply to the expat, U.S. tax statements, and payroll deposit activity from the home office to the expat's U.S. bank account. To prove the transitory nature of the assignment abroad, however, the file should also include (a) evidence of delivery of the current expat policy to the expat; (b) the expat's acceptance of the assignment for a specific term of limited duration and under the terms of the expat policy; and (c) the instrument that embodies the choice of law and set off clauses mentioned above. The expat and, as a precautionary measure, two

witnesses should sign all the documents that reflect the expat's consent to his assignment abroad.

The final—and best—course of action is to ensure that expat terminations are carried out in compliance with both U.S. and foreign law. As we saw above, a U.S. employer may lose the right to terminate an employee, or open itself to liability exposure, if it fails to comply with local technical termination procedures. The best approach to ensure the proper application of both local and foreign law is to implement expat termination procedures that require participation by HR and legal personnel from both the U.S. and the foreign entity.

## Conclusion

COUNSEL REPRESENTING U.S. MULTATIONALS must be sensitive to the potential application of foreign law to the employment termination of expats working abroad. The labor laws of the coun-

tries where they work will likely protect expats working in Latin America. These labor laws set forth unwaivable protections, such as the right of indemnification for terminations without cause. Moreover, Latin American labor laws restrict an employer's ability to terminate for cause. A U.S. multinational operating in Latin America can avoid expat claims by adding appropriate clauses in the contractual arrangements with the expat, keeping adequate records, and ensuring that terminations comply with both U.S. and applicable foreign law.

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## ENDNOTES: Roberto E. Berry, Esq.

<sup>1</sup> Law No. 20.774, May 13, 1976, B.O., art. 245, amended by Law No. 25.877, March 18, 2004, B.O. [hereinafter Argentina's Labor Contract Code].

<sup>2</sup> The 1988 Brazilian Constitution replaced the traditional "indenização" with the present equivalent Guaranty Fund for Length of Service, which compensates a worker in any dismissal, with or without cause. Constituição Federal [Constitution of the Federal Republic of Brazil, hereinafter C.F.], art. 7, § III.

<sup>3</sup> Law 8.036, May 11, 1990, art. 18, D.O.U. May 14, 1990, and Complementary Law 110, June 29, 2001, art. 1, D.O.U. June 30, 2001.

<sup>4</sup> Mexico's Federal Labor Law, art. 50 [hereinafter L.F.T.].

<sup>5</sup> *Id.* This feature of the law provides the employee with a strong settlement bargaining chip against the employer defendant if his claim has any colorable merit and he can stretch the litigation for a significant amount of time.

<sup>6</sup> See Mexico's L.F.T., art. 47 (specifying fifteen types of conduct justifying termination for cause); Brazil's *Consolidação das Leis do Trabalho* [C.L.T.], art. 482 (specifying twelve types of conduct); but see Argentina's Labor Contract Code art. 242 (1976) (stating that just cause must be determined by judges, considering the nature of the labor relationship).

<sup>7</sup> Assuming foreign law applies to the termination of an expat, an employer would not be entitled to dismiss an employee without severance if the conduct constitutes cause for dismissal only under U.S. law.

<sup>8</sup> See, e.g., Andrea M.L. Pasold Búrigo, *Demissão por Justa Causa: Hipóteses de Incidência* (discussing Brazilian law and stating that "it is essential that the sanction be applied immediately, or else the offense is deemed forgiven"), available at <http://www.advocaciapasold.com.br/topicos/demissaooporjustacausa.html> (last visited Sept. 9, 2005); Elmer Arce Otríz, *Constitutional Relevance of Formality and Procedure in Employment Terminations*, at 2.2.3 (discussing Peruvian law and stating that "the length of time [between the employer's knowledge of the employee's offense and termination] must not be too prolonged so that the worker can be freed of continuous responsibility for past offenses"), available at [http://www.amag.edu.pe/Files/Acre\\_Relevancia%20constitucional.htm](http://www.amag.edu.pe/Files/Acre_Relevancia%20constitucional.htm) (last visited Sept. 9, 2005).

<sup>9</sup> See *Moreno Ramos v. Superior Court*, Tribunal Constitucional, Sala Primera, Moquegua Ex.p. No. 640-2004-AA/TC May 5, 2004 (holding that dismissal three months after knowledge of employee theft is unjustified), available at <http://www.tc.gob.pe/jurisprudencia/2004/0640-2004-AA.html> (last visited Sept. 9, 2005); see also *Pereyra v. Servicios de Almacén Fiscal Zona Franca y Mandatos S.A.*, Labor Chamber of Buenos Aires, Sala VII (March 27, 2003) (finding that termination on July 3, 2000 after knowing of employee's wrongful use of computers in March and April, 2000 was unjustified), available at [\[dezdelpch.com.ar/Leyes/Fallo%20despido%20uso%20correo%20electr%20Sala%207%20camara.htm\]\(http://dezdelpch.com.ar/Leyes/Fallo%20despido%20uso%20correo%20electr%20Sala%207%20camara.htm\) \(last visited Sept. 9, 2005\).](http://www.hfernan-</a></p></div><div data-bbox=)

<sup>10</sup> L.F.T., art. 517.

<sup>11</sup> Mexico's L.F.T., art. 47.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Constitución Política de los Estados Unidos Mexicanos [Mexican Constitution] arts. 1, 5, 123 (protecting all individuals and guaranteeing the right to work, among other rights); Brazil's C.F., art. 5 § XII (protecting all individuals and guaranteeing the right to work, among other rights); Argentina [Const. Arg.] arts. 14, 20 (protecting all individuals and guaranteeing the right to work, among other rights).

<sup>15</sup> See Amparo directo 319/94, Jessie Blevins L., XV S.J.F. 222 (Octava época 1994) (Mexico) (stating that a foreign worker in the territory has right to sue or be sued in labor proceedings even if presence in the territory is illegal).

<sup>16</sup> See Argentina's Labor Contract Code, art. 22 (an employment relationship exists when one person performs acts, works or services in favor of another, in a dependent capacity, voluntarily, and in exchange for compensation); See also Chile's Labor Code, Official Gazette, art. 7 (2002) (an employment relationship exists when one person performs acts, works or services in favor of another, in a dependent capacity, voluntarily, and in exchange for compensation). In fact, the analysis of whether a person is an independent contractor or an employee centers on the issue of subordination.

<sup>17</sup> Mexico's L.F.T., art. 16, defines a "company," as the economic unit of production and an "establishment," as any technical unit that contributes to the attainment of the company's objectives. Argentina's Labor Contract Code arts. 5, 6, sets forth the same structure.

<sup>18</sup> Brazil's C.L.T., art. 2 § 2 provides that: "Anytime one or more independent legal entities exist under the direction, control or administration of another, constituting an industrial group, commercial or of any other economic activity, the entities will be jointly responsible, in terms of the labor relationship, with the principal entity and each of the subordinate entities."

<sup>19</sup> See, e.g., Mexico's L.F.T., art. 5 ("The provisions of this Law are of public order so that no stipulation, oral or in writing, will have legal effect, nor prevent the enjoyment and exercise of rights, if it provides for . . . § XIII waiver by the worker of any of the rights and prerogatives set forth in the labor norms"); see also Brazil's C.F., art. 193 (stating the "social order has as its base the supremacy of work . . .").