

## **Global Law Experts Practice Area Guide**

### **Employment Q&A**

*Please fill in the following:*

**Name of your firm: MBB Balado Bevilacqua Abogados**

**Name of expert answering Q&A: Mercedes Balado Bevilacqua – Analia Durán**

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**Below is a Q&A for the Employment Practice Area Guide. Please feel free to pick and choose which questions you answer, as you may not deem some of them to be relevant. Many thanks in advance for any quote and comment that you can provide.**

- 1. Please summarise the work your firm does and the ways in which you distinguish yourself in the provision of employment/labour law advice.**

MBB Balado Bevilacqua Abogados is a leading labor and employment boutique firm, founded by Mercedes Balado Bevilacqua in November 2012. We counsel and represent local and international clients, as well as assist international law firms with their matters in Argentina. The firm is recognized for its expertise in complex local and cross-border employment law matters, MBB Balado Bevilacqua Abogados recently expanded its practice to include counseling in corporate, trade, contractual and tax matters, thereby providing comprehensive legal services to minimize clients' legal risks and liability exposure and help them thrive during challenging times across Latin America legal and socio political complex scenario.

Our firm daily assists clients with designing cutting-edge policies and practices to comply with their legal obligations and enhance workforce management. From matters relating to health and safety, social security, compensation and benefits, family and medical leaves, hiring and terminations, litigation and settlements, restructuring due to M&As, collective dismissals, collective bargaining agreements, to a myriad of other employment issues. The firm is specially focused in developing successful strategies to prevent harassment and discrimination at workplace and to promote positive interaction in multicultural payroll, gender equality, diversity and inclusion. We also provide clients with specialized and uniquely-tailored counseling and representation to optimize the workplace, keep pace with the current market needs, and protect foreign investments, based on the client's industry and specific niche.

MBB Balado Bevilacqua Abogados also regularly forms non-exclusive alliances with international law firms across the globe (including the U.S., Canada, Mexico, France, Germany, England, Spain, Denmark, Japan, China, Peru, Brazil, Colombia and other countries in Latin America) to maximize the benefits and minimize the risks of clients with multinational operations, regardless of the location.

Mercedes Balado Bevilacqua and Analia Duran have been recognized locally and internationally as leaders in labor and employment law in Argentina, accomplishing the goal of developing and success in a male dominated area of law. The firm has been recognized by The Legal 500 Latin America for 2013-2020, Chambers & Partners Latin America for 2013-2020, Who's Who Legal 2015-2020 and as "Best Labor Boutique Firm in South America" for Women in Business, England.

Mercedes Balado Bevilacqua and Analia Durán are active involved in forums and seminars focused in women in legal profession, advocating for anti-discrimination policies and the introduction of gender diversity policies and workshops in the workplace.

Mercedes is a prolific author and frequent speaker in local and international conferences around the world and has received multiple recognitions for her work, including having recently received the "Gender Diversity Lawyer of the Year – Argentina" recognition by the "Chambers Diversity & Inclusion Awards - Latin America 2019" for her work to promote gender diversity; and for being the only leading female lawyer in her practice area by Legal 500 Latin America for the years 2012-2020, Chambers & Partners for the years 2011-2020, and Who's Who Legal for the years 2015-2020 in the field of Labor and Employment and in the area of Pensions and Benefits.

Additionally, Mrs. Balado Bevilacqua is an appointed in the management committee of the Forum of Cross Border Human Resources Experts (XBHR) as a unique representative of Argentina and a participating member of various committees within the International Bar Association ("IBA"), the American Bar Association ("ABA"), among other professional associations.

Mercedes and Analia have received multiple other important recognitions by the legal community, chambers of commerce and professional associations. Such recognitions, publications, and speaking engagements are featured on our firm's website.

**2. How have you had to adapt your work methods in light of COVID-19, in order to maintain your existing client relationships? Is there now more emphasis on advising your clients from home and on video apps?**

On March 19, 2020, Decree No. 297/2020 established the "mandatory social and preventive isolation" ("the Isolation") for all the citizens of the Argentine Republic and for all those individuals staying temporarily in the territory.

Therefore, we have implemented a home-office regime with pre-scheduled team work calls twice a day to coordinate the firm's workload and due deliver to client an as a way to stay internally connected promoting engagement among members of the firm. In this scheme, every member of our firm keeps on assisting to our clients via e-mail, video conferences, phone calls, and text messages. This modality did not affect the quality of our tailored made professional services provided nor the prompt attention that characterizes us.

We also promote flexibility during home-office to balance work and family duties focusing in accomplishment of goals rather than a fix working schedule.

In order to maintain the relationship with our clients, we keep them informed and updated about the legislative developments, and each member of our firm is at the client's entire disposal in case they need assistance, clarifications or doubts.

It is important to mention that during the last months the COVID-19 situation has changed all the labour and employment paradigms and it is a challenging situation for lawyers to walk clients through this difficult situation trying to keep companies running while at the same time take possible measures to preserve job positions in a very strict and protective framework where terminations and suspensions due to lack of work or force majeure have been forbidden and a

very strong union influence. Therefore, we, as a team, are in constantly communication in order to exchange opinions to optimize interpretation about new current regulation with the aim to provide our clients and organizations we assist with the accurate and creative solution to their needs.

**3. What does your current workflow look like – and what are some of the various employment law issues clients are bringing to your attention presently? If possible, please provide a recent case study, demonstrating your service offering in emergency management, particularly cases that entailed new challenges or complexities.**

The COVID-19 crisis did not affect the current workflow of the firm. The main difference is that nowadays we are all working from home. The firm was a pioneer in implementing remote work for lawyers with the aim of encourage a balance between work and family. Therefore, the firm were fully adapted to this mode of work when the COVID-19 pandemic hit the country.

Regarding relevant law issues, all clients need extensive advice on constant regulations enacted during preventive and mandatory isolation as consequence of COVID-19. One very strong Argentine Government measure is that it issued and will continue to do so complex regulations affecting employments matters due to the protective nature of our labour regulations.

Thus, the majority of our workflow focused in exploring alternatives for clients in order to reduce labor costs but at the same time accomplishing with the termination and suspension for lack of work prohibitions measures taken by Government.

Also, we assist companies in order to assess whether their business may be considered as “essential” for them to be able to run business and draft the necessary paperwork avoiding delays in chain production or services.

We assist our clients in the urgent implementation of remote work for not essential staff and helped them to fit remote work in their industries and collaborate with them in the creation of new code of conducts applicable to home office including flexible working schedules, respectful interaction, foster HR actions towards strength integration among the employees and motivate team work, put in place rules for efficient work during videoconferences and how to develop effective tools such as accomplish with productivity goals more than with fix schedules for parents in charge of children or older relatives..

**4. How have employment disputes been affected without, for example, the option to go to court? Has your advisory role in this area been able to proceed with a degree of normality?**

Since the Isolation was established, the Judiciary Power has declared an “extraordinary recess” and there is just a minimal and indispensable presence of employees on duty in courts. For those employees, the Government has established that shift judicial services are exempted from the Isolation.

However, in order to ensure the access to the justice and to the competent authorities, the following digital alternatives were implemented:

- a) Presentation of the mutual agreements between employer and employees regarding the suspension of activities due to economic causes established in Section 223 bis of the National Employment Law (“NEL”). These agreements must be signed by the employer and employee, and submitted online for the approval of the Ministry of Labor, Employment and Social Security (*Ministerio de Trabajo, Empleo y Seguridad Social – “MTEySS”*).

- b) Conciliatory agreements procedure: the MTEySS approved a virtual procedure, which is still under process of being implemented, in order to carry out the conciliatory hearings that were previously suspended due to the Isolation, and the new hearings that are requested by employers or employees. It is important to mention that in Argentina, the conciliatory procedure is mandatory prior filing a labor claim.
- c) The National Supreme Court of Justice (*Corte Suprema de Justicia de la Nación* "CSJN") approved the digital filing of lawsuits, direct appeals and complaint appeals (except for criminal matters).
- d) The CSJN established that the use of the digital and electronic signature is admitted within the scope of the CSJN itself regarding the different jurisdictional and administrative acts subscribed by the Ministers and Secretaries of the Court, and to magistrates and officials of lower levels. These provisions facilitate the continuity of current legal proceedings.
- e) As consequence of mandatory isolation, judicial labor matters are on hold, and all hearings will be rescheduled. We are seeing that the mandatory isolation caused by COVID 19, is directly affecting litigation, therefore judicial terms will be longer than expected.
- f) In the same line, conciliatory procedures before the Ministry of Labor are delayed and waiting for implementation of digital procedure, therefore administrative resolution of cases are also taking more time than before.

Regarding the firm's advisory role, it has not greatly changed, the firm is very active in assist their clients in foreseen best scenario to help to reduce costs of payroll so that they may keep business running during this extraordinary crisis by negotiating with employees a voluntary and temporary reduction of labour hours, from full time to part time job in certain cases, voluntary and temporary reduction of salaries, advance of vacations, etc. Also, we work very close to our clients to effectively deigned remote work policies

**5. Have you seen a drastic increase in disputes or pending litigation as a result of employees being laid off due to the coronavirus, or do you expect this to become more prevalent as time goes on? Please give details.**

In Argentina, by means of Decree No. 329/2020, published on the Official Gazette on March 31, 2020, the Government established the prohibition to dismiss without cause, and to dismiss or suspend employees due to lack or reduction of work or for reasons of force majeure for sixty (60) days counted as of March 31, 2020 (until May 29, 2020 inclusive).

Afterwards, by Decree No. 487/2020, published in the Official Gazette on May 19, 2020, the Government extends the term of the prohibitions for sixty (60) days counted as of May 30, 2020 (until July 28, 2020 inclusive).

Therefore, employers must comply with the following provisions:

- 1) Terminations without cause -regular terminations- are forbidden until July 28, 2020 (inclusive);
- 2) Terminations based on lack or reduction of work or force majeure are forbidden until July 28, 2020 (inclusive);
- 3) Suspensions due to force majeure or for lack or reduction of work are forbidden until July 28, 2020 (inclusive).

The only options available by the Decree are the suspensions of personnel for economic causes (“the Suspensions”) under Section 223 bis of the “NEL”.

It is important to bear in mind that any termination or suspension that is done in violation to these prohibitions will be of no effect. So, the employee will continue to be under the payroll of the company and the company is obliged to provide tasks if possible due to its activity. If the company does not provide tasks although it is possible, the employee still has the right to collect salaries. So once, the mandatory isolation is over, the employee may file for reinstatement and the authority may uphold the claim and order the payment of accrued salaries and the compliance with the withholdings and contributions to the Social Security System.

Therefore, as dismissals are forbidden and the Courts are in recess except for extraordinary filings or pending ones, there has not been a drastic increase. Due to the protective nature of Argentine regulation and Government position towards terminations or suspensions, it is highly probable that this prohibition will be extended until the COVID-19 crisis is more resolved, however, this is going to be a very complicate situation for companies which need to downsize to survive. Still very early to assess concretely, considering that Argentina is at least six weeks behind Europe and USA in terms of COVID-19 impact.

**6. Have you seen a notable increase in benefit fraud as a result of employees, or the self-employed, being furloughed during the pandemic, or do you expect this to become more prevalent as time goes on? Please give details.**

As explained before in point 5, by means of Decrees No. 329/2020 and 487/2020, suspensions due to force majeure or for lack or reduction of work are forbidden until July 28, 2020 (inclusive). The only options available by the Decree are the suspensions of personnel for economic causes under Section 223 bis of the NEL.

Regarding the last point, on April 29, 2020, the MTEySS issued Resolution No. 397/2020. The Resolution establishes some aspects regarding the approval from the MTEySS for the Suspensions for economic causes mentioned above, taking into account the parameters established by the Agreement executed between the General Labor Confederation (*Confederación General del Trabajo – “CGT-”*), and the Argentine Industrial Union (*Unión Industrial Argentina - “UIA-”*). In addition, on June 8, 2020, Resolution No. 475/2020 issued by the MTEySS established that the provisions of the prior Resolution (No. 397/2020) will be valid for other 60 days.

Below, the main aspects of the Resolution:

- 1) It establishes the approval procedure to be followed (prior legality control) for the submission of agreements regarding the Suspensions, executed by unions with legal recognition and companies.
- 2) The requirements that must be complied with are:
  - a. The agreement must be executed only regarding those employees who may not render services from their isolation place. Therefore, the Suspensions may not be applied for the following employees: i) those who have established with their employers the working conditions in order to render services from their isolation place; ii) those employees who are exempted from the duty to attend to their workplace (pregnant employees, employees who are 60 years old or more, and employees included in risk groups);
  - b. A list with the affected personnel must be submitted;
  - c. The Suspensions’ term must not be longer than sixty (60) days as of April 1, 2020 (that is, until May 31, 2020);

- d. The amount of the non-compensation amount paid to the suspended employees may not be less than the seventy-five per cent (75%) of the salary that they would have received if they rendered services in a normal way;
  - e. Over the amount mentioned in point “d”, the corresponding withholdings and contributions to the Health Insurance and to the National Health System must be done, and the payment of union fees;
  - f. If the company receives the benefit of the “Complementary Salary” (within the framework of the Emergency Assistance Program for Employment and Production (Programa de Asistencia al Trabajo y la Producción -“ATP”-), the amount of the “Complementary Salary” must be included in the non-compensation allowance paid to the suspended employees;
  - g. The application of the Suspensions by the employer may be ordered simultaneously, alternately, rotating, total or partial, according to their respective productive realities;
  - h. Employers who apply this agreement must not alter their employees’ payroll during its term (they may not terminate employees);
  - i. The agreement will not apply to those parties who have already agreed or will agree other suspension criteria.
- 3) All the agreements entered into by and between the union with legal recognition and the Companies that regulate the application of the Suspensions and comply with the requirements mentioned in point 2, will be approved by the MTEySS after the relevant legality control. The same applies for those agreements that are more beneficial to employees.
  - 4) Agreements of Suspensions that comply with the requirements mentioned in point 2 but are filed only by the employer, will be sent to the union with legal recognition for a period of 3 days, and may be extended for an additional 2 days at the request of the union. Upon expiration of the term, if the union remains silent, the suggested agreement filed by the employer will be deemed to be accepted. In case the union rejects the terms of the agreement, an instance of dialogue and negotiation will be opened between both parties.
  - 5) If the agreements do not meet the requirements mentioned in point 2, they will be subject to prior control by the MTEySS and in each case the corresponding considerations will be indicated.
  - 6) In all cases, the parties submit an affidavit regarding the authenticity of the signatures contained in the agreements.

On June 8, 2020, Resolution No. 475/2020 issued by the MTEySS, established that the approval procedure to be followed (prior legality control) for the submission of agreements regarding the suspensions for economic causes (specified in Resolution No. 397/2020 of the MTEySS, mentioned before) will be valid for other 60 days.

In conclusion, as suspensions are forbidden, there are not consequences such as a notable increase in benefit fraud as a result of employees, or the self-employed.

**7. What form of counsel do you provide to prevent, and combat, workplace discrimination or persecution? Perhaps provide a recent case study demonstrating your expertise in this area.**

As we mentioned before, with the firm’s description, we are committed to promote gender diversity and anti-discrimination policies locally and cross-border. Evidence of such engagement is our participation in the different Chambers in Law Woman Seminars around Latin America (Chile and Paraguay) and the fact that Mrs. Balado Bevilacqua has been distinguished by Chambers Diversity & Inclusion Awards Latin America 2019 as highly recommended “Gender Diversity Lawyer of the Year – Argentina”.

As part of employers’ duty of safety, they need to provide all measures address to protect the employee physically and mentally. Therefore, we usually assist Human Resources areas of our

clients to put in place COVID-19 awareness program to stress hygiene and safety policies for essential workers. Also, we work in promoting workshops to provide employees with a working environment free from any harassment, discrimination or persecution. In such sense, we counsel on preventing, handling and solving discrimination or any other hostile behaviour. We foster companies to draft policies towards equality and diversity to empathize the setting in place seminars focussed to these matters.

A frequent query is related to the payment of employees' salaries and potential differentiations. It is a sensitive topic due to the fact that the National Constitution ("NC") establishes the principle of equality before the law, which includes the principle of equal compensation for equal tasks. So our advice is to promote diversity while complying with our constitutional rights, especially when addressing salaries involving different genders in equal positions.

**8. How do you ensure a well-informed advisory scope for clients who are based in other jurisdictions, or have operations based overseas? For example, are you especially active in network events such as conferences wherein information is exchanged among member firms?**

We make sure that all of our clients, locals and foreign based receive a solid and updated advice. To that end we analyse in particular the following: i) the client's business and goals; ii) the foreign law, practices and customs; and iii) how to make the client's goals and practices work within Argentine local regulations.

In view of the above, we are experts in handling a variety of complex local and cross border legal matters and recognized for our expertise in providing preventive counseling aimed at minimizing clients' exposure and contingencies, considering our client's particular needs.

Our international focus is reflected, among other issues; in non-exclusive alliances with international law firms, mainly from United States of America (USA), France, Canada, Germany, England, Spain, Denmark, Japan, China, Mexico, Brazil, Peru, Colombia and other countries of Latin America, for its clients with operations in Argentina. This perspective provides us with a distinctive profile when counseling our clients.

We have been singled out by International Legal Review, Legal 500 Latin America 2013-2020, Chambers and Partners Latin America 2013-2020 and Who's Who Legal 2015-2020 and awarded "Best Labour Boutique Firm in South America" by "WIB", Women in Business, England (<https://www.wib-news.com/2017-balado-law-mercedes-balado-bevilacqua>).

In addition, we are very active both locally and internationally at an academic level (in lecturing and writing), having participated as speakers and moderators of different conferences from the International Bar Association (IBA), American Bar Association (ABA), Latin Lawyer, New York Bar Association, Practising Law Institute New York, International Association of Young Lawyers (AIJA), Forum, Business Hot Topics, etc.

We also contribute to local and international publications about our area of expertise.

**9. How has your work been recently affected in the areas of renewal visas or documentation for: key workers, business partners, investor-directors and multinational executives? What unique challenges has this brought?**

In view of Resolution 1644/2020, issued by the National Migration Office (*Dirección Nacional de Migraciones – "DNM"*) and published in the Official Gazette on March 12, 2020, the issuance of visas and temporary, transitory and special residences in Argentina is suspended.

Below, the main aspects of the Resolution:

- a. The processing and issuance of applications for temporary / transitory residences, electronic travel authorizations and special residences are temporarily suspended. The processing of applications for admission as a "transitory resident" of foreigners who are abroad are also temporarily deferred.
- b. The power delegated to the Argentine Consulates for the processing of the residence applications is interrupted.
- c. The nationalities covered in the suspension mentioned above are, by this time: China, South Korea, Iran, United States of America, England, Northern Ireland, European Union countries and those countries which are part of the Schengen area. This list may be extended in the future,

Currently, the DNM is not receiving any paperwork, so this measure is affecting our work. We recommend our clients to be patient about this matter, since there is nothing that can be done.

**10. Are you aware of any new or pending labour/labor law legislation that may affect your work? If so, please give details.**

As mentioned in our fifth answer, the government has prohibited dismissals without cause, and dismissals or suspensions of employees due to lack or reduction of work or for reasons of force majeure until July 28, 2020 inclusive.

Also, Resolution No. 279/2020, mainly, established the following:

- Employees under the scope of the Isolation will be exempt from the duty of assistance to the workplace, with the exception of those considered as "essential personnel";
- Employees whose normal tasks may be carried out remotely (in isolation) must agree in good faith with their employer the conditions to render services from their home. This provision may be only applied if the employee is not infected by COVID-19 nor he/she has any symptoms.
- In all cases, employers must guarantee hygiene and safety conditions established by the Health Ministry to preserve the employees' health and well-being.
- During the term of the Isolation, private sector employees are entitled to receive their normal salary.

According to Decrees No. 34/2019 and 528/2020, in the case of dismissal without cause notified to employees as of December 13, 2019 until December 6, 2020 inclusive, the affected employee is entitled to receive the double of the corresponding severance compensation. It is also applicable, when the employee considers himself/herself constructively dismissed.

As explained above, the strict and protective nature of Argentine labour law regulations sometimes is seen as an obstacle for companies that need to go through restructuration process or are struggling to pay salaries due to the serious crisis caused by the COVID-19 pandemic and the measures taken to avoid its spread. Therefore, we provide a tailored made and creative counselling aimed at trying to keep companies running while minimizing risks and exposure.

*If you have any queries, please contact me.*

Kind regards,

Richard Adams

Editor

**GlobalLawExperts**