



LABOUR

INTENSIVE

As workloads pick up, labour and employment lawyers are striving to prove their international capabilities while navigating protectionist legislation at home, finds Rosie Cresswell

During January – summertime in Brazil – much of the population is on vacation and workloads lighten, but not for the country's labour lawyers. "We certainly had more work than usual for that time of the year," says Luís Ferraz Mendes, head of labour at Pinheiro Neto Advogados. The situation is the same in Mexico: "Usually following the busy end to a year, the beginning of the next is slow, but that wasn't the case. Things continued to flow hard and fast," says Jorge de Presno, the lead labour partner at Thompson & Knight in Mexico City. "Because of the times we are facing many companies are very sensitive about the optimisation of workforce, agreements and unions."

Labour and employment lawyers expect two areas of their practice to become increasingly busy as a result of the economic downturn. First comes a rise in consultancy work and future planning. Some months later, litigation is likely to pick up as employees that did lose their jobs file lawsuits.

For now, firms are mostly finding clients are in the consultancy stage, requiring help to do as much as possible to avoid dismissals and subsequent litigation. "Since October, we have seen a significant increase in consultations and requests for counsel from companies relating to questions such as reduction of the work day, employee lay-offs, collective vacation, and suspension of employment agreements," says Otávio Pinto e Silva of Brazilian firm Siqueira Castro – Advogados. Similar requests are being fielded by lawyers elsewhere in the region. At the moment, Marval, O'Farrell & Mairal's lawyers in Argentina are working on restructuring, redefinition of compensation structures, negotiating severance packages with highly remunerated key executives, and the negotiation of collective bargaining agreements and special agreements with unions. Lawyers are formulating strategies for companies to best manage restructurings of their workforce. In Peru, for example, Rodrigo Elías & Medrano Abogados is offering labour audits. "We are offering clients audits so they can avoid future problems with employees and reduce labour and employment costs. We have also devised a structure to help prevent lay-offs of employees wherever possible," says practice head José Balta.

"There are a number of things that can help companies maintain their workforce, yet significantly lower costs," says Baker & McKenzie's labour head in Mexico, Jorge de Regil. These include eliminating shifts, reducing salaries, changing work schedules or benefits. Companies might want to modify the way they pay salaries – for example, switching from a flat salary to variable compensation – or amend labour conditions. "It's very common to have companies wanting to reduce work shifts or cancel fringe benefits," says Oscar de la Vega at Basham Ringe y Correa SC in Mexico.

Take that country's car-part industry, which has been predictably hit by the woes of the big three car manufacturers in the US. Thompson & Knight's de Presno says he has helped companies

when Embraer announced it was laying off 4,000 workers in Brazil in response to plummeting sales last month, the country's President Luiz Inácio Lula da Silva described the board's decision to let a fifth of its workforce go without first talking to unions as "hasty". The plane manufacturer was then hit with an injunction from a labour court in the state of São Paulo preventing it from making the dismissals until it negotiated with the workers' representatives.

Those negotiations are likely to be fierce, for no one should underestimate the power of unions in Latin America. In Brazil alone, there are some 15,000, and all communication with employees has to go through them. Furthermore the concept of redundancy does not exist there – only dismissal, and whether it is with or without cause determines whether a worker receives severance pay or not. While several instances fit the definition of "cause", they all refer to misconduct of an employee, and never to the performance of the company.

Such a backdrop has grave implications for companies under pressure to cut costs as the global economic gloom encroaches further on the region. Embraer's situation is by no means unique in the region.

As businesses reassess their labour requirements, widespread dismissals become increasingly common. Not surprisingly, many are in labour-intensive industries such as energy, manufacturing and construction, but the services industry has also been hit hard

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and businesses in sectors ranging from entertainment to IT are far from immune. But in a region where legislation strongly favours the worker, the issue is a hugely sensitive area, and companies are turning to local lawyers for legal advice on how best to address the problem.

in the sector implement structures by which they reduce days of work and proportionally salaries, known as technical stoppages, or economic conflicts. "Companies are thinking of ways to optimise resources. We have been focusing on trying to avoid lay-offs," he says. "Reducing personnel is a last resort."

LABOUR PRACTICE HEADS HAMMER HOME THE IMPORTANCE OF PREVENTING DISMISSALS.

Labour practice heads hammer home the importance of preventing dismissals. They recommend careful labour planning so as to conform to market needs and avoid massive labour claims or costly negotiations such as those Embraer could be facing.

Strategies that protect business results, the work done in branding and the efforts made in rendering a message on employee care and balancing employment conditions can be successful, at least in the mid-term. Even before the current situation, like other firms, Marval O'Farrell's advice was always to act in a preventative way. "A detailed analysis in advance proves to be the most appropriate strategy for anticipating contingencies and being prepared to deal with them in the most creative and cost-efficient manner, fully complying with applicable law," explains labour partner Javier Patrón.

Also in Argentina, Brons & Salas's Gustavo Ferrante stresses the importance of keeping trade unions on side. Typically, labour lawyers begin the year negotiating collective bargaining agreements for wages and benefits with unions on behalf of clients. Such negotiations were particularly delicate this time around and unique compromises have subsequently made their way into the bargaining process. "It was difficult because of budgets and uncertainty – no one knows if we are at the bottom yet," says Basham Ringe's de la Vega.

This emphasis placed on dispute avoidance is easily explained: end up in court and employers will not have an easy ride, as labour legislation in many countries in Latin America tends to favour the employee. But while good preparation beforehand can smooth the ride and disputes can be avoided by mutual consent and settlement agreements, for some companies hit by this crisis, disputes will be unavoidable – as Nelson Mannrich of Felsberg Pedretti Mannrich e Aidar Advogados in Brazil has seen. "We've been facing an increase on collective claims related to dismissals, wages or working hours reductions and restructuring procedures," he says. "For instance, we're assisting a number of clients that, due to the economic crisis, were forced to dismiss or reduce the salaries and working hours of a significant number of employees, which involve negotiating with the labour unions representing their employees and defending their interest before Brazilian labour courts." Companies might face collective or union disputes involving adversarial collective bargaining petitions or labour claims. Former employees seek payment of labour and severance benefits if they can't find other jobs. When it does get to this stage lawyers manage mass lay-off matters, complex labour negotiations and filing multiple trials. "When disputes are inevitable or we are called upon after the conflict started, we advise clients of the possible legal strengths and weaknesses they have or will have in the conflict and how to best deal with the dispute strategically considering the legal framework, whether it be by engaging in litigation, collective bargaining, or in amicable settlement negotiations," says Manuel Diaz, labour partner in Baker & McKenzie's Venezuelan branch.

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Lest we forget, law firms have been hit by the financial crisis too, and a labour practice could be a very significant life aid when you consider other departments, especially M&A and corporate finance, are finding there is less and less work to fill their days. Firms are predicting revenue from labour departments will grow anything

between 10 and 25 per cent during the course of the year as a result of the crisis, expecting such growth to continue into 2010 and quite likely beyond. "While planning our 2009 budget, our partners relied heavily on the labour department," says de Presno. "Firms with strong labour departments are going to be better off than those without."

Firms facing significant revenue drops not only want to take advantage of these opportunities – particularly when there are few to be had elsewhere – they want to maximise them. Lawyers are being encouraged to cross-sell, identifying clients that are not working with the labour department, researching their main labour problems and explaining how they can be useful. They are beefing up manpower in the area accordingly, making promotions, hiring new associates or transferring lawyers from other teams. Felsberg Pedretti in Brazil made two new partners and incorporated six new associates into the team last year, with further plans for expansion. Argentina's Marval O'Farrell hired four new senior associates into its labour team in 2008. "This trend is not expected to cease, as labour queries are increasing every day

NOWADAYS, LABOUR ATTORNEYS NEED TO UNDERSTAND A COMPANY'S GLOBAL NEEDS

– the tendency will continue for at least three to five years," predicts labour head Patrón. In Peru, Rodrigo Elías recently hired two labour specialists as partner and of counsel and intends to hire one additional attorney in the next two months to deal specifically with procedural matters. Guyer & Regules in Uruguay has transferred lawyers from other teams and is hiring new ones.

But recruiting into a labour and employment team is easier said than done. These teams need lawyers with litigating skills and experience in local legislation for consultancy work, but for some years it has become more and more important to have those versed in international matters, and herein lies a problem. Once seen as an exclusively local practice, nowadays labour attorneys need to understand a company's global needs as well as having the technical skills to deal with courts, unions and authorities in a local legal framework. "Good labour and litigation skills used to be enough," says Basham Ringe labour head De la Vega. "Now you need a global perspective and technical support."

Put simply, labour work is becoming harder. "Not every lawyer has the necessary skills to succeed in this area," says Juan Carlos Varela of Squire Sanders & Dempsey SC in Venezuela. "A labour lawyer is also a consultant, expert negotiator and mediator. As labour issues are becoming more global, local labour lawyers are finding it harder to help clients in a more integral and global way."

"It is rare to find labour professionals with experience in M&A and consultancy work," adds Luiz Felipe Tenório of Brazil's Barbosa Müssnich & Aragão. An absence of language skills is the biggest problem for firms with international clients. "Traditionally one doesn't associate labour lawyers with expertise in counselling overseas clients who can speak in foreign language," says Beretta Godoy's Mercedes Balado in Argentina.

But while the work itself may be changing, perception is still an issue. As Brons & Salas' Ferrante points out, those lawyers that are fluent in English prefer to work in the corporate practice area, but there is a



suggestion interest could pick up. “It could become a very popular area, depending on the effects of the international crisis within the scope of labour relations,” says Ariel Orrego-Villacorta of Peru’s Barrios Fuentes Gallo.

Promoting international capabilities is certainly an effective way for firms to compete in the labour market, particularly at the moment, when the effect of the crisis on companies in the US for example is far more advanced than for those in Latin America; firms say they are fielding more requests from international than local companies at this stage. Basham Ringe is a member of Lus Laboris, a global alliance of human resources lawyers, which enables it to maintain an international status, while Baker & McKenzie and Squire Sanders & Dempsey make use of their regional presence. “If a multinational company needs to implement a global labour policy, we are able to review and adjust it to conform to the applicable local labour laws of multiple jurisdictions in a simultaneous and timely manner,” says Baker & McKenzie’s Diaz. Squire Sanders meanwhile has at least one labour partner and associate in each of its offices in Rio de Janeiro, São Paulo, Caracas and Santo Domingo, and assigns partners in affiliate offices elsewhere.

There are other ways firms can maintain a competitive advantage – provincial offices can help a labour and employment department stay familiar with local labour courts, judges and unions, particularly in areas with heavy manufacturing and industry. It also helps to have a strong tax department. Lorena Arambula of Cárdenas & Cárdenas in Colombia says her team consults with the tax team to see if there are tax alternatives that could benefit employees. Equally, Peru’s labour law is very tied to tax law. “If you don’t have a strong tax team you probably won’t be able to give the best advice,” says Rodrigo Elías’s Balta. “You need a litigation team to support you too.”

FEW ARE AT HOME

But while labour and employment lawyers react to clients’ increasingly global needs, they are having to navigate very restrictive legislation on

their behalf at home. “In Argentina, if there is any doubt, the judge has a duty to favour the employee,” says Beretta Godoy’s Balado. In Peru, if a company wants to cut 10 per cent of its workers, it needs approval from the government, and according to Estudio Rubio, Leguía, Normand & Asociados’ Víctor Ferro the Ministry of Labour and Social Assistance has a traditional policy on rejecting employers’ request for approval to make dismissals, even in contexts such as the current crisis.

This tension between lawmakers and employers looks set to increase as the impact of the economic downturn continues to unfold. Clearly the crisis has highlighted a gap in legislation on how to manage workforces in times of economic downturn across the region. Basham Ringe’s De la Vega says that “2009 is a very important year – the crisis is demanding new ideas on how to face problems”. “There is a proposal to change the labour law already in Mexico,” adds Baker & McKenzie’s De Regil. “In our opinion, this law needs an update very much, so this proposal is very important for our country.” Equally, Mariá dos Santos Guitti, head of Lefosse

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Advogados’ employment practice in Brazil, calls for Congress to define the country’s labour law in a situation of crisis. And yet at the same time, on the other side of the debate, unions in Argentina, for example, are calling for dismissals in times of crisis to be prohibited, while in Peru the government is apparently evaluating the possibility of enacting measures to protect workers and companies in the face of the international crisis. But the general labour law has been publicly debated for some years – there is deadlock between parties over compensations and collective bargaining rules.

“There is none of the flexibility companies need at the moment, they have many problems moving through regulation,” says Miranda & Amado’s Jorge Toyama in Peru. “Although it’s good for labour lawyers, of course.” While no one wishes the current climate to last, it’s hardly surprising law firms are pouring resources into one of the few practice areas where the work looks set to continue for some time.