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Employment Of Expatriates In México

By Mónica Schiaffino

As Latin America has become home to an increasing number of multinational enterprises, we have seen a corresponding growth in expatriates living and working in Latin America. While this transition can be accomplished without undue hardship, before companies employ expatriates in Mexico they must consider Mexican labour relations laws and regulations and the resulting rights of employees in Mexico – these rights may be greater than would be the case in many other countries. This article outlines some of the primary issues arising from the employment of expatriates (the "Expatriates" or the "Expatriate") in Mexico.

First, Mexico's Federal Labor Law ("FLL") and Social Security Law ("SSL") apply to all employment in Mexico, regardless of any choice of law provision in the international assignment letter, the nationality of the employer or the employee, the place where the salary is paid, or where the employment agreement is executed. An Expatriate working in Mexico has the same statutory rights as any Mexican employee under the FLL and the SSL, including rights to vacation, vacation premium, Christmas bonus, profit sharing, health and pension benefits, and severance in the event of a wrongful termination.

Another concern arises from the presumption in Mexican law of a joint employment relationship: by both the Mexican subsidiary and the non-Mexican parent company. When such a joint employment relationship is found to exist, Mexican law requires both the Mexican subsidiary and the non-Mexican parent "employer" to comply with Mexican labor law.

A finding of a joint employment relationship may also have income tax implications as the non-Mexican parent company could be considered to have a permanent establishment in Mexico because it has employees carrying out activities there on its behalf.

1. **<u>Available Options</u>**

In light of the issues noted above, hiring Expatriates in Mexico requires careful planning to avoid unanticipated problems for the employer (or its parent company). The following are possible approaches to help minimise risk of liability:

A. **Termination of Employment by Parent Company** - To help limit exposure under the FLL: (1) The parent company could terminate its employment relationship with the Expatriate before he or she begins working in Mexico (being sure that the termination is carried out and documented according to the requirements of the law applicable to the employment relationship between the parent company and the Expatriate); and (2) The Expatriate then enters into a new employment contract with the Mexican subsidiary covering the full amount of salary and benefits to be paid.

B. **Mirror Payroll** - An alternative is to use a "Mirror Payroll" or "Shadow Payroll" in which: (1) The parent company and the Mexican subsidiary enter into a secondment agreement in which the parent agrees to let the Mexican subsidiary hire the Expatriate for a certain period of time and to deposit the salary of the Expatriate in a bank account designated by the Expatriate (on the instructions of the Mexican subsidiary since it is the legal entity obligated to pay the salary to the Expatriate), and to continue to include the Expatriate in its benefit plans; and (2) The Mexican subsidiary and the Expatriate then enter into an employment agreement setting out the terms of employment according to Mexican legal framework. The parent company charges back to the Mexican subsidiary the amounts paid for salary and benefits. The Expatriate must be registered as an employee with the Social Security System and all documents for regis-

tration must be consistent with the data furnished in the employment agreement.

C. **Split Contract** - This option requires three separate contracts to delineate clearly the relationships among the Expatriate, the Mexican subsidiary, and the parent company: (1) A "disruption contract", executed between the parent company and the subsidiary, whereby the parent company allows the subsidiary to hire the Expatriate, and the subsidiary assumes the obligation to pay a fee to the parent; (2) A "sleeping employment contract" executed between the Expatriate and the parent company to suspend the employment relationship; and (3) An employment contract between the Expatriate and the subsidiary, which should comply with the FLL and clearly establish the date on which the Expatriate begins work at the subsidiary and his or her total salary and fringe benefits. This limits the benefits paid directly by the Mexican subsidiary.

The Split Contract strategy creates a strong argument that the FLL is inapplicable to the parent company and that the Mexican Conciliation and Arbitration Boards do not have jurisdiction over the parent company's employment contracts if a wrongful dismissal action is filed by an Expatriate against the parent company in Mexico.

2. Immigration Matters

Regardless of which alternative is chosen, Expatriates require a work visa to enter and work in Mexico. Failure to have the appropriate visa may result in the imposition of fines upon the Expatriate and deportation. In addition, if the Expatriate is found within an office or factory without the proper visa during an inspection, the subsidiary may also be fined.

3. Conclusions

For many organisations, the "Mirror Payroll" and "Split Contract" alternatives may be the most practical in most situations and reduce risk for both companies. Which of the two options is chosen depends on the particular circumstances of the parent company and the Mexican subsidiary. Tax issues must also be considered before a final decision is made.

Monica Schiaffino is a shareholder in Littler's Mexico City and Monterrey, Mexico offices. She is a skilled labour lawyer and experienced employment litigator, and has published extensively and spoken on a range of important labour and employment issues. Schiaffino has also been named one of Mexico's leading lawyers.