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advantages to offer a variety of environments that encourage foreign investors to consider the Honduran tourism industry. We have the legal framework to protect the investors in any scenario, always providing the corresponding care of our cultural heritage and economic development.

LATIN AMERICAN REGION

Anti-corruption policies: practical aspects of its implementation in Latin America

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Due to the extraterritorial application of anti-corruption legislation now in force in many countries, multinational companies need to implement policies in all of the jurisdictions that they operate to minimise the risk of non-compliance. Due to unique labour laws in many Latin American countries, implementation needs to be tailored specifically to each jurisdiction.

This article analyses the effects of the Foreign Corrupt Practices Act (FCPA) on multinational companies operating in Argentina, Brazil, Chile, Colombia and Peru, with specific focus on its practical consequences from a labour perspective.

Availability of FCPAs affirmative defences in Latin America and key aspects to take into account in lobbying and promotional activities

In short, the FCPA makes it unlawful, either directly or through its representatives, agents or employees, to corruptly make an offer, payment promise or actual payment in favour of a foreign official, foreign political party, foreign political party officer or candidate. It is not just direct payments or offers to corruptly pay public officials companies need to be mindful of. They also need to ensure that promotional or lobbying payments are not a front for such payments.

Companies need to be particularly careful with lobbying and paying promotional expenses to government officials in the states considered. In Argentina, for instance, the payment of promotional expenses for government officials, as well as travel and entertainment, is prohibited. Moreover, donations to politicians or political parties must be done by Argentine residents. Foreign companies could only therefore make political contributions through local subsidiaries.

An action is corrupt if it is done with the intent of inducing the recipient to misuse their official position to direct business wrongfully to the payer or any other person.

A person charged with a violation of the FCPA's anti-bribery provisions may assert as a defence that the action was lawful under the written laws of the foreign country or that it was a reasonable and bona fide expenditure, such as travel and lodging expenses, as part of demonstrating a product or performing a contractual obligation with a foreign government or agency.

The second affirmative defence, concerning bona fide expenditure, would be applied objectively and there should not be differences between jurisdictions. However, the legality of prohibited conduct in each jurisdiction varies. This is perhaps the key point for multinationals with operations in Latin America.

For all intents and purposes, all of the prohibited conducts set out in the FCPA, as it would be applied in the respective local jurisdictions, are crimes under Argentine, Colombian and Peruvian law. Accordingly, the first affirmative defence could not apply in relation to actions occurring in those jurisdictions.

A slight distinction needs to be drawn with Chile. Although the prohibited offences are all crimes, the company's responsibility for the acts of an employee may be diminished

or eliminated if it has in place a corruption prevention policy and this policy was not adhered to by the employee.

The situation in Brazil is more complicated. Anti-corruption legislation is directed towards public servants and not the private corrupt agent. Although there is criminal liability for the agent, this cannot be attributed to the person or company that asked the agent to perform the corrupt act.

Implementing an effective anti-corruption policy: domestic legal matters to be aware of

Overwhelmingly, it is apparent that affirmative defences based on local laws will not be possible in the Latin American jurisdictions considered. Accordingly, it is imperative that companies put in place systems to prevent corruption from occurring. As aforementioned, in the case of Chile, having such a system in place could provide a company with a defence under local law in the event that the employee disregards this system and it could, therefore, provide it with an affirmative defence. Even in those jurisdictions where such an affirmative defence is not available, establishing corruption prevention systems is essential to reduce the chances of being liable under the FCPA.

In each of the five jurisdictions considered, it is permissible to implement a labour-control and transparency policy to reduce instances of prohibited acts. The requirements for such policies have the following common features in each jurisdiction:

- they must not be in violation of local law, particularly labour law;
- the policy should be proportionate to its purpose; and
- it should be in writing.

Additionally, and although this is not a strict requirement in some jurisdictions, it is advisable to have the employee sign a copy of the policy at the commencement of employment. If the policy is issued after the commencement of employment, employers should have the policy signed by all employees.

In some jurisdictions, there are limits on the ambit of labour-control policies. For instance, in Argentina if the policy determines an employer's control over employees' conduct, we recommend that it is filed with the Ministry of Labour as evidence of absence of violation of employees' dignity and privacy rights. In Chile, policies must have temporal and territorial limits. This means that policies can only be applied to employees when they are working and/or in the workspace. In Peru, all companies that have more than 100 employees are required to prepare a document entitled 'Internal Work Regulations' and submit it to the Ministry of Labour for approval. For multinational companies operating in Peru, one option would be to incorporate the anti-corruption policy into this document. For smaller companies it could be done through a specific policy.

How to secure the legal tools for investigating acts of corruption

A key way to minimise corruption risks is to monitor employees. The most obvious and, perhaps, the easiest way to do this is through email. However, in many jurisdictions, the ability of employers to monitor emails is limited. A common point in each jurisdiction is that due to the employee's right to privacy, employers are not able to monitor personal email accounts. Notwithstanding that employees may use company computers, networks and servers, employers are not able to monitor employees using their personal email accounts. Employers can, however, create firewalls preventing employees from accessing certain websites or types of websites, which may include personal email accounts.

The situation with company email accounts is different. In short, it is possible, in some form, to monitor employees' company email accounts in each jurisdiction considered. However, the right to monitor and the scope of the monitoring is different in each jurisdiction and can be summarised as follows:

Argentina

Subject to the prior written authorisation of the employee, the employer may monitor work emails. However, the confidentiality of personal emails, even when sent and received through work email addresses, must be maintained. It is advisable to have this policy of control filed with the Ministry of Labour to get its authorisation as evidence of lack of violation of employees' privacy rights.

Brazil

Provided that the monitoring policy is communicated to employees and enforced consistently, employers may monitor work emails. Private emails sent through work accounts may be blocked, but they cannot be monitored.

Chile

Employers have the right to regulate the conditions, frequency and opportunity to use email at work, but under no circumstances does this entitle them to violate an employee's right to private communication. Employers are not, therefore, entitled to view emails unless they could be considered non-private communication. This may represent a conflict with the interest of the employer to protect its information, which Chilean courts have not addressed. Interestingly, in order to overcome this conflict, employers have explored using investigation protocols and tools aimed at safeguarding the employee's privacy, such as searching emails by keywords or appointing external investigative teams bounded by non-disclosure provisions. Nevertheless, these have not been sanctioned by labour authorities.

Colombia

Company email accounts are considered to be work tools and the company's right to view emails generally supersedes the employee's right to privacy. This right to monitor emails is not absolute. Advanced notice must be given of the monitoring and private emails must be kept confidential.

Peru

No Peruvian law specifically covers the right of an employer to access and monitor employees' emails. However, the constitution recognises the fundamental right to privacy. Accordingly, and in practice, emails can only be viewed or intercepted with the proper warrant from a judge. Any private communication that is viewed through this process must be kept confidential.

In those jurisdictions where emails can be monitored without judicial authorisation, it is advisable that written consent be obtained from the employee at the commencement of the employment relationship or at some point of the labour relationship if the control policy is issued after commencement of employment. In addition, when emails are being monitored, employers should avoid reading personal emails and, at a minimum, keep those emails confidential if viewing them is unavoidable as part of wider monitoring.

Employers should also be aware that in some jurisdictions there are restrictions on maintaining databases connected to employees. In all cases, personal information about employees must be kept strictly confidential. In Argentina, all databases must be registered with the Ministry of Justice. Employees' consent is required to keep databases and they cannot contain sensitive information about employees, such as race, religion, political affiliations, sexual preferences and union affiliation. Importantly, information on databases cannot be sent to or stored in countries outside of Argentina that do not have the same standards of data protection. Peruvian law is materially identical to Argentine law on this point, except for the requirement to register databases with a government authority. Restrictions on maintaining databases with sensitive information also exist in Chile and Colombia. Furthermore, in Colombia, employees have the right to view and update any information stored about them on a database.

Blowing the whistle: employees' rights and duties with respect to corrupt actions of bosses and colleagues

Except in relation to certain professions, such as lawyers or accountants, and only in certain cases, employees are not obliged to report the corruption of superiors and colleagues to the company or public authorities in the majority of jurisdictions considered. However, in Colombia citizens have a constitutional obligation to cooperate in the administration of justice. This requires them to report corrupt actions to the police. If an employee with knowledge of a corrupt act failed to do so, he or she could be subjected to criminal action or sanction by the employer.

Given that there is generally no positive obligation on employees to report corruption, a commonly mooted way to increase reporting is through the establishment of a whistleblower system. Establishing such a system is possible in all of the five countries considered, however, the implementation requirements vary. In Peru, employers are entitled to set up any procedure in the workplace that they deem appropriate for any purpose; accordingly, they can establish a whistleblower system through internal regulations or other instruments. In all other jurisdictions, a whistleblower system can be set up, provided that the system does not conflict with employee dignity and does not lead to harassment.

For legal and practical reasons, a whistleblower system set up using the following parameters would meet the minimum common requirements of each jurisdiction:

- an anonymous reporting system;
- the system must be notified to employees in writing;
- if the identity of the whistleblower is volunteered, that person should not be subjected to harassment, reprisal or discrimination from either the company or the person about whom the report was made;
- the whistleblower's report should be substantiated by evidence before any disciplinary action is taken against the allegedly corrupt employee; and
- notwithstanding the anonymous report, the company must comply with all privacy and other legal obligations when conducting any investigation into the allegedly corrupt employee.

What companies can do upon uncovering a corrupt act and what they must do

Only in Colombia is a company obliged to report a corrupt act to public authorities. This arises from the constitutional mandate to cooperate in the administration of justice. In all other jurisdictions there is no specific requirement to report corrupt acts to public authorities. In Chile, although companies are not required to report employees' corrupt acts to the authorities, if a company does so before it is aware that it is being investigated for the corrupt act, it can plead diminished responsibility. This would not be sufficient to raise an affirmative defence under the FCPA because the company would still be liable; it would just not be subject to the same sanctions that would otherwise apply.

The disciplinary actions that a company can take against an employee vary in each jurisdiction. Under Peruvian law, an employer can dismiss an employee if that person is found guilty of committing of an offence covered by the FCPA. An employer may not need to wait until the employee is found guilty of the offence if it can be proven that the action was in violation of his/her good faith obligation to the employer or contrary to the internal work regulations of the company. Brazil and Colombia are quite similar to Peru; however, employers in those jurisdictions are able to dismiss employees for criminal acts committed by the employee in the workplace or in the performance of work duties, without waiting for criminal sanction.

Argentina and Chile provide the greatest protection for employees in the event that they have committed a corrupt act, and employers should be extremely cautious before dismissing employees on this basis. Both jurisdictions provide for progressive disciplinary measures starting at a verbal warning through to straight dismissal. If the action of the employee is sufficiently serious, an employer may immediately dismiss the employee. In any event, disciplinary measures must be based on specific actions set out in the labour laws of the respective countries. In neither jurisdiction does this include committing a criminal offence, although the same action that gives rise to criminal liability may be punishable under labour law. In Argentina disciplinary measures must be based on serious misconduct from the employee that is a breach of his/her duties as an employee. The main employees' duties to the employer are: (i) good faith; (ii) cooperation; (iii) no competition; (iv) confidentiality; (v) obedience; and (vi) safeguarding work tools.

A difficult situation may arise if an employee is carrying out the instructions of a supervisor. As mentioned, in Argentina, for instance, there is a duty of obedience to the employer. However, this duty is not absolute and an employee can validly refuse to obey instructions if to do so it would perform a corrupt act. This position is the same across the jurisdictions considered. That a superior instructed them to do it is not a defence to breaching obligations to an employer. Brazil provides a measure of protection for the employee in that it must have been apparent to an ordinary man that what was being requested was illegal. Further, Brazilian courts have also found that it is not reasonable, in some instances, for employees to refuse to obey instructions if the consequence may be that they would lose their jobs.

Supervisors also bear an amount of responsibility for the actions of their employees in each jurisdiction. In each jurisdiction, if the corrupt act of the employee is subject to disciplinary action, it is strongly recommended that the supervisor be disciplined appropriately as well. The situation is not as clear when the employee has acted without instructions. Supervisors have an obligation to oversee the work of their employees. In Colombia, for instance, the supervisor will not be held accountable if he or she proves that the subordinate behaved improperly, in such a form that the supervisor had no means to prevent or stop his or her actions. The Colombian position encapsulates the state of the law in all jurisdictions considered.