PRESENTED

14th Annual Labor and Employment Law Conference

May 17-18, 2007

Austin, Texas

GOING GLOBAL

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GOING GLOBAL:
LAW PRACTICE IN THE GLOBALIZATION ERA

By: David T. López - Houston, Texas

Chances are that if you have not already been contacted you will be within the next year on a labor issue with international implications.

A few years ago, after I made a presentation on international law issues, several attendees wrote in their comments that nothing in my talk had anything to do with their practice. Since that time, I have dealt with matters dealing with Mexico, Argentina, Panama, Great Britain, Saudi Arabia, Pakistan, and possibly other countries.

Mine is not a large law firm, and at present, in fact, it is a solo practice. Although I have had a long-standing interest in international matters, some background in international trade union affairs, and a record of participation in international bar activities, I did not get those cases because of an international reputation. I was able to respond because of familiarity I acquired of international legal issues and my willingness to research foreign law and procedure when necessary. In the relatively short format appropriate to this presentation, I would like to pass on some suggestions for those of you who would like to be able to take on some international matters when the opportunity arises, particularly for those of you who, like me, do not have the resources and contacts of a major law firm.

You might have seen my article in this month's Texas Bar Journal on the same theme. I noted there why Texas Lawyers, whether or not involved in an employment and labor practice, need to be comfortable with at least the basics of international labor law principles.

Halliburton is moving its senior management from Houston to Dubai. China is said by NASA to be the next visitor to the moon. There is increasing reliance of the United States on direct foreign investment that could presage a rapid takeover of American enterprises by foreign corporations. A unit of a major medical and hospitalization insurer has entered into an agreement with a hospital in an Asian country, promising Americans they can save up to 84% on their medical procedures by what it calls medical tourism. Even more significant to lawyers, outsourcing of jobs to India now has extended from call centers and other information system services to legal work. A service now is advertising a partnership between an office in India, staffed with lawyers, paralegals and other support personnel, and a United States office that deals directly with clients. The advertised services include document drafting, legal research, deposition summaries, paralegal services and advice in specialized areas of the law.

Not only must we be concerned about international legal work possibly coming in the door, but now also the potential that some of our client work might be going abroad out the door.

Labor law throughout the world is as diverse as the governments, economies and cultures of the various nations, and acquiring detailed knowledge of every aspect is impractical, if not impossible for an individual. Becoming familiar with certain basic principles, however, will enable a practitioner at any level in any area of practice to address with some confidence questions and opportunities with international implications when they arise.

A likely possibility for an international labor case is presented by a law, originally enacted in 1789, that has seen a recent reinvigoration–the Alien Tort Claims Act of 1991 (ATCA), 28 U.S.C. § 1350. The statute states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

You might recall that ATCA sustained a major setback in a lawsuit over the 1984 explosion in Bhopal, India, that killed 2,100 and was characterized as possibly the worst industrial disaster in history. A New York federal district judge dismissed a case brought in behalf of the explosion victims. The dismissal was on grounds of *forum non conveniens, In Re Union Carbide Corp. Gas Plant Disaster*, 634 F.Supp. 842 (S.D. N.Y. 1986).

The revival of ATCA began in Texas. In *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (1990), the Texas Supreme Court held that Texas had abolished the doctrine of *forum non conveniens* in wrongful death and personal injury actions arising in a foreign country. Further clarification of the scope of ATCA followed. In *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. CA 1997), Burmese farmers sued, asserting that the construction of offshore drilling platforms and land pipelines were resulting in their villages being destroyed and individuals being enslaved both by private companies and government agencies. The court found jurisdiction over the oil companies, but not the government, under ATCA. A related case, *Doe v. Unocal Corp.*, 110 F.Supp. 2d 1294 (C.D. CA 2000), analyzed some of the more significant provisions of ATCA. The *Unocal* cases, however, are of more historical than substantive interest, since the district court holdings were modified on appeal and the appeal eventually was dismissed.

The utility of the law is hampered by the necessity to show that the United States company actually participated in conduct constituting a violation of international law. Cases have been dismissed where the evidence tended to show that the civil rights violations were attributed to the foreign government and there was no evidence of participation by the private company.

With the enlistment of many United States workers for assignments in Iraq and other foreign countries, the possibility exists of an action arising on the other side of the coin, that is, an action by United States citizens, not aliens, for claims arising abroad. In *E.E.O.C. v. Aramco*, 499 U.S. 244 (1991), the Supreme Court held that Title VII, and by implication similar laws proscribing discrimination in employment, did not apply extraterritorially absent some clearly expressed intention by the Congress for such application. In 1984, the Congress had amended the Age Discrimination Act to specifically make it applicable abroad to United States employees of American controlled corporations. There has been continuing litigation on the scope of extraterritorial coverage, for example, the Americans With Disabilities Act has been held applicable

to foreign flag cruise ships while in United States waters. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000).

In some ways, the labor laws of the United States are unlike those of almost every other industrialized nation, with practical effects that must be kept in mind.

For example, the United States is alone among developed countries in taxing the income earned abroad by its citizens. See Keith Bradsher, *For U.S. Workers Abroad, Tax Bill Proves a Handicap*, International Herald Tribune, September 1, 2006. That can place United States companies in an adverse competitive position since other countries might not have to consider the impact of income taxes on the salaries of their expatriates. On the other hand, when counseling Americans being recruited to work abroad, it is not only appropriate, but customary, to discuss a supplement for income taxes, as well as other pay issues, such as cost of living and housing.

Another aspect of United States labor law that is unique is the employment-at-will principle. That absent contract terms to the contrary, an employer has no obligation to continue the employment of an individual, and the individual has no obligation to continue working is not statutory, but a creature of judicial opinion. See, *Adair v. United States*, 208 U.S. 161 (1908) ("[I]t is not within the functions of government-at least, in the absence of contract between the parties-to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another.")

In advising a client contemplating a job abroad, counsel must take care to insure that the right to continuing employment is not inadvertently waived by contract, since the right can be very significant. In some European countries, for example, an individual claiming wrongful discharge is entitled to continue receiving pay while the claim is being determined. If a United States employee is claiming to have been wrongfully discharged from employment abroad, then, of course, careful attention must be given to the law of the country in which the claim arises. There might be an argument that the claim arises in a country other than that in which the individual has been based, if the individual is charged with duties in several countries and the discharge more closely relates to a country other than that in which the individual is based.

The decline in union membership experienced in the United States is not reflected in other industrialized nations. Rights to organize for collective bargaining are substantially more extensive and protective of the individual in other developed countries than they are in the United States, including China, which adapted its current labor laws from a German model. The practice in German labor relations of having strong union participation in plant operations also has been adopted in other countries. For the employment and labor law practitioner in solo or small firm practice in the United States, such considerations might not appear to have a ready practical application. A general knowledge, however, can provide guidance for advising developing local unions or might suggest ways of resolving individual workplace conflicts.

As United States groups organize to attempt to bring about changes in American labor laws, such as the pending Employee Free Choice Act, talking points can be developed from the legislative approach in other countries. Many countries, including Mexico, for example, have labor principles that are of constitutional dimensions, including provisions for minimum wages and benefits, such as bonuses and assistance in financing housing. Additionally, laws that in the United States are intended to protect the employer, such as provisions for non-compete agreements and protection of intellectual property, are much more considerate of worker interests in foreign jurisdictions. An employer might be required to provide additional compensation for such protections. China, for example, recently enacted legislation that provides that an employer must pay a former employee for as much as three years in order to maintain effective a non-compete agreement.

Both employers and employees in the United States might have an interest in resistance to American labor laws that arise in foreign jurisdictions. France, for example, strongly has resisted Sarbanes-Oxley provisions by providing stringent restrictions on the imposition of whistleblower limitations by employers. An explanation of the restrictions put in place by the French Data Protection Authority (in English) can be accessed at http://www.cnil.fr/index.php?id=1982. The regulations provide that any system established to encourage reporting of company misconduct must meet specific requirements, including the limiting of issues that can be addressed and also limiting anonymity.

In dealing with matters in European countries, one must take into account the various directives emanating from the European Union. Although the intent has been to harmonize the laws of the various European countries, including their labor laws, there remain distinct differences, but at the same time, adherence is required to EU principles. Any individual in a EU country, for example, can rely on treaties, regulations and directives of the EU, whether they have or have not been incorporated in the labor laws of his or her country. Each court in a European state must interpret its national laws in accordance with EU directives, even when the law in question was not enacted as a result of the directive. Also to be carefully considered are laws applicable to a particular country. In France, for example, employment contract terms, such as the amount of compensation, may not be varied without the consent of the other party, even when an employer wishes to increase the compensation of an employee.

Lawyers advising commercial enterprises must give careful consideration to emerging competition from overseas companies, the costs and any limitations foreign law imposes on their labor, and the potential for interruption of components or raw materials from abroad.

United States companies sending employees on long-term expatriate assignments would be derelict if they did not fashion an employment agreement that fully takes into consideration the laws of the country or countries in which the employees will discharge their duties. A claim might be actionable in the forum of the country in which it arises, notwithstanding conflicting contract terms that have been inartfully drafted. Prohibitions against discrimination because of protected characteristics as specified in American law are applicable in most circumstances, and in many cases, the law of the national forum can provide more extensive protection. Dispute resolution clauses providing for mediation and arbitration are increasingly common and generally upheld.

Termination of employment, with or without a written contract, can be made subject to local law that is much more protective of the individual than is the law in the United States. That is particularly the case in the European Union when a reduction-in-force, also referred to as a redundancy, is given as the reason for the termination. Such a termination likely will be found to require severance terms that are substantially more generous than those that are customary in similar situations in the United States.

Trade union organizations are increasingly well organized and sophisticated in conducting international actions. National centrals, such as the AFL-CIO, are affiliated to a worldwide body, the International Trade Union Confederation (ITUC), successor to the International Confederation of Free Trade Unions (ICFTU). The ICFTU regional bodies, the one for the Western Hemisphere being the Interamerican Regional Organization of Workers, known as ORIT from its initials in Spanish, are expected to be incorporated into the new organization by the latter part of this year. The ITUC will coordinate closely and to some extent will share governance with 17 international bodies organized by trade or industry and known as international trade secretariats (ITSs). Among the major ITSs are the International Metal Workers Federation (IMF), the International Transport Workers Federation (ITF), the International Federation of Chemical and General Workers' Unions (ICF), the International Federation of Commercial, Clerical, and Technical Employees (IFCCTE/FIET), and the International Federation of Plantation, Agricultural and Allied Workers (IFPAAW). Detailed information on most of these organizations and their activities can be found on their web sites.

With the increasing sophistication of international trade union groups has come the opportunity for attorneys that advise them to have a salutary influence on the promotion of effective economic development and international trade. American unions have a long tradition of international activity and sometimes are perceived as promoters of the status quo and enemies of labor reforms that might lessen the influence of existing unions, such as some in Mexico that exercise virtual monopoly power over their industrial sector.

Once an attorney has established a relationship with a company or an individual engaged in work outside the United States, there is a continuing obligation to be vigilant for development that might affect the client. Last October, for example, the Department of Defense promulgated an interim rule applicable to defense contractors and intended to combat trafficking in persons such as to force them to engage in sex acts. Provisions now must be included in employment contracts that prohibit engaging in a "commercial sex act." The definition of "commercial sex act" is problematic in its generality, "any sex act on account of which anything of value is given or received by any person." The definition is not limited by its terms to prostitution and could ensnare a contractor employee who gets lucky on a date after dinner or a concert.

Bottom line is that one cannot ignore the increasingly important effects of satellite communication, the Internet and continuing advances in transportation of goods and persons. Every attorney must be mindful of the effects of such changes on commerce and the service industries, and a useful understanding of such effects must be undergird by a basic understanding and general

appreciation of international labor principles. Here are some suggestions on how to get, develop and maintain a working knowledge of international labor laws and principles.

Look for and give attention to reports of events affecting labor abroad in publications you might already read regularly, such as *The Wall Street Journal*, *The New York Times*, *The Washington Post*, *Financial Times*, *Forbes* or *The Economist.*

The American Bar Association publishes *International Labor and Employment Law: A Practical Guide*, as well as other more specific publications and online seminars. Some recent ones that still are available online include "Cross Border Employment, Discrimination, Non-Competition and Privacy: A Practical Look"; "Labor and Employment Issues In International Transactions"; "Employment Agreements and Cross Border Employment", and "Cross Border Employment and Mobility Issues in Europe and Latin America: A Closer Look at International Assignments."

Podcasts of the 2006 International Employment Law Symposium of the Los Angeles County Bar Association are available through the association's web site. The podcasts are of presentations by experienced labor lawyers on various international labor law topics.

A multi-volume treatise *Labor and Employment Laws*, available from the Bureau of National Affairs, covers national labor laws in separate chapters by country. Specific information on individual countries also can be found by searching the web, or by going to the Global Legal Information Network site at www.glin.gov or the Law Library of Congress, www.loc.gov/law/public/law.html.

The International Labor Law Committee of the American Bar Association provides an excellent opportunity for learning, networking and travel. Information on the committee can be found at http://www.abanet.org/dch/committee.cfm?com=LL108000. (The committee meets this month in Rome. Previous meetings have been in London, Madrid, Tokyo, Hong Kong and other venues.)

For those particularly interested in Mexico, there is the United States-Mexico Bar Association, www.usmexicobar.org. The ABA International Law Section has a Mexico Committee, http://www.abanet.org/dch/committee.cfm?com=IC845000.

The International Bar Association, the Interamerican Bar Association, the International Association of Lawyers (Union Internationale des Avocats), and the World Association of Lawyers often include discussion of labor issues in their programming.

Other web sites of potential interest on international labor matters are the Federation of European Employers, www.fedee.com; Amicus, Great Britain's largest public sector union, at www.amicustheunion.org.; and the International Labour Organization, a tripartite international organization with management, union and government participation, www.ilo.org.