

Client Roundtable

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The Globalization of Labor Standards: Managing Risk in a Challenging World Economy

Introduction:

In-house counsel representing a range of U.S. corporations turned out for a full-day Baker & McKenzie conference addressing globalization of labor standards and the impact on multinationals in today's economy. Corporate attorneys are facing labor issues that span the interpretation of foreign hiring practices and workplace rules to the development of compliance standards and the shifting role of organized labor.

Throughout the day, specialists tackled a host of thorny topics: the role of influential policy groups such as the Organization for Economic Co-operation and Development, human rights issues, corporate social responsibility, the changing nature of labor unions throughout the world, and the regulatory landscape in major world markets, including fast-growing economies such as China and Latin America.

The event was moderated by Kevin B. Coon, a partner in Baker & McKenzie's Toronto office, focusing on labor, employment and regulatory compliance, and Douglas Darch, a partner in Baker & McKenzie's Chicago office, specializing in employment litigation and labor relations.

"These are the issues that will affect the C-suite," said Coon. He underscored the disjointed approach to labor policy occurring at many U.S. corporations and urged conference participants to take leadership roles in managing corporate policy.

Changing Framework for Labor Relations & The Impact of Labor Standards:

Comparative law expert sees "spongy" global labor landscape

Labor standards in the global landscape remain blurry as the hard law of established rules and adjudicative procedure intersects with the soft law of corporate codes and the policies of influential policy groups around hot-button issues such as wages and the workplace environment, said Professor Matthew Finkin, a University of Illinois College of Law professor specializing in the advanced study of comparative labor law. Citing corporate examples ranging from Wal-Mart Stores to IKEA and Nike, Finkin described an environment where multinationals are entering uncharted territory over issues as mundane as whether employees have the right to wear beards in the workplace to those with economic impact, including whether the right to part-time work translates from a company's domestic market to those of its foreign affiliates.

“When you take a look at hard law in the global legal environment, it looks pretty spongy,” said Finkin, who framed the day’s agenda by defining the roles of non-sovereign entities such as the United Nations International Labour Organization (ILO), non-government organizations (NGOs) and labor unions in shaping the labor policy of multinational corporations. Some of these groups have become adept at promoting meaningful soft law agendas, “corporate codes and like instruments that may be aspirational, but may in fact have more bite on the shop floor than the seeming role of hard law,” said Finkin, a member of the governing board of the Institute for Labor Law and Employment Relations and a labor arbitrator.

The influential ILO, for example, continues to push throughout the world for ratification of its conventions, capturing headlines as it “jawbones” one government to the next over the adoption of principles addressing the right to work and collective bargaining, freedom of association and the abolition of child labor. Even after countries ratify ILO conventions, assessment of follow-through in practice is difficult, he said.

Contradictions in international labor policy abound. The United States has ratified only one of the four newest principles adopted by the ILO in 1998 – the abolition of child labor – yet the U.S. exercises the power to impose trade sanctions on trading partners who don’t abide by the full set of principles, he said.

Equally knotty is the effect of labor law violations on the multitude of trade agreements enacted by the United States, including the North American Free Trade Agreement (NAFTA) and the Central American Free Trade Agreement (CAFTA). Consider Guatemala, said Finkin, where violence is common and trade union leaders have been killed, resulting in complaints that could result in the imposition of sanctions.

Meanwhile, as the practice of outsourcing continues, laws addressing extra-territoriality are gaining interest. The implications of maintaining a call center in a country handling private records for a company whose customers reside in another nation are evolving, said Finkin, citing a directive from the European Union that requires member states to observe privacy principles when exporting confidential information.

“I think privacy is one area that’s a sleeping giant,” said Finkin, adding that issues tied to corporate supply chain and the treatment of workers retained by vendors hired by multinational corporations are ripe for interpretation as legal precedent is set. The growing collaboration by labor unions around the world is another trend worth watching; it is a development that could give additional negotiating power to weakened unions, such as those in the United States, Finkin said.

“There’s an enormous amount of activity going on,” he added, citing trade unions’ establishment of overseas offices and growing liaisons between unions and works councils, the shop-floor groups that represent workers. Global labor issues have garnered increased attention in the public eye, largely due to campaigns by unions and other vocal groups with stakes in the outcome of emerging policies. “You’ve got to protect the integrity of the label,” he said, in closing remarks. “If you get a bad reputation, if boycott campaigns are mounted, this can really hurt a corporation very seriously.”

Role of OECD Guidelines & U.S. National Contact Point for U.S.-based Corporations doing Business Globally:

NCP Representative Says New OECD Guidelines To Focus on Human Rights

The Organisation for Economic Co-operation and Development (“OECD”), the United Nations-sanctioned international group that promotes best practices for global trade, is likely to put more weight on workers’ rights when it releases new voluntary guidelines next year, said Diane Reimer Bean, who heads the U.S. National Contact Point (“NCP”). “We can expect that the new guidelines may have a greater emphasis on human rights,” said Bean, an attorney with more than 22 years of broad foreign policy experience.

The NCP serves as a clearinghouse for complaints filed by NGOs, environmental groups, unions, individuals and others alleging violations by multinational corporations against OECD policy guidelines. Those guidelines address issues ranging from employment relations and bribery to taxation and competition, said Bean, outlining a sometimes-protracted complaint process that can span months.

The NCP works to resolve differences between parties on a consensual basis, she said, adding that the office’s assistance includes mediation, external conciliation, and related efforts. The process is designed to take a back seat to the laws of local government where a dispute occurred, she said, adding the guidelines do not intend to expose multinationals to conflicting expectations.

“I want to stress that what I am talking about here is soft law, this is social responsibility, it’s not legal liability and it’s not legal responsibility,” she said. “Even after a decision has come down, often that doesn’t completely solve the social responsibility issue. These are very challenging cases.”

The current review of guidelines is being spear-headed by John Ruggie, a Harvard professor and the U.N. Secretary-General’s Special Representative for Business and Human Rights. Ruggie has criticized the OECD for not putting greater emphasis on human welfare in light of global moves by multinationals toward local hiring and capacity building in foreign markets, Bean said.

Among leading topics garnering interest in the current policy debate is the sphere of influence that multinational corporations hold over their subsidiaries, suppliers and franchisees, she said.

“It’s another area where I think commonly accepted principles have moved in the direction of requiring greater due diligence on the part of headquarters,” said Bean.

Complaints filed against corporations in the United States are made known by the NCP to C-suite executives and kept confidential, if requested. That does not preclude trade unions and other groups with political agendas from publicizing actions taken with the NCP, said Bean, noting that four open NCP cases all center on labor relations issues.

Alongside the current review of OECD guidelines is a separate examination of the function of the NCP, said Bean, adding that the United States has been criticized for not being aggressive enough. Corporations and other interested parties have

been invited to participate in an open discourse led by the State Department's Advisory Committee on International Economic Policy, she said.

"Our administration, the Obama administration, is very keen to promote corporate social responsibility for many reasons," said Bean. "Compliance with (OECD) guidelines assures foreign governments and their societies that U.S. multinational enterprises will be responsible partners."

The Role of NGOs and Trade Unions, and the Risk to Employers in the New Labor Relations Framework:

International Organization of Employers Sees Unions Gaining Influence

Faced by steadily declining membership, trade unions around the world are deploying questionable tactics to increase their influence on global labor policy, said Brent Wilton, deputy secretary-general for the International Organization of Employers, which represents labor and social policy interests for businesses around the world.

"We are seeing more and more effort at the international level where trade unions are punching above their weight in terms of the impact they can have on a business's operations," said Wilton, citing moves that range from union recruitment on Internet sites such as the Second Life virtual community to public relations campaigns designed to embarrass corporations into hastily signing human rights accords. The International Trade Union Confederation ("ITUC"), formed in 2006 from a merger of the International Confederation of Trade Unions and the World Confederation of Labor, has helped to coordinate the efforts of national trade unions and shift the focus toward sectoral issues, said Wilton, a lawyer with 25 years of experience assisting companies with human resource issues.

Under new leadership, the group may be preparing to exert increased influence over other global union federations as it seeks to gain more power on the world stage. Meanwhile, the possibility of additional mergers is likely, said Wilton, citing a proposed combination of separate federations representing mining workers, chemical workers and textile employers under a unified Global Manufacturing Union in 2012.

Among current threats to multinationals is the push by the global union federations for so-called International Framework Agreements ("IFA"). These pacts, negotiated between multinationals and global union federations, spell out worldwide labor principles a company must adhere to as prescribed by the United Nations' Global Compact. IFAs currently number 84, said Wilton, noting their proliferation lends credence to the notion that unions may be on a path toward eventual global collective bargaining. "The fundamental purpose is unionization, nothing more," said Wilton, adding that of all the GUFs, the Union Network International ("UNI") has been most aggressive in pushing for these agreements. "They may wrap it up in nice language, but it's about getting numbers in the union."

IFAs are often boilerplate, vaguely written, and difficult to interpret practically into law due to their reliance on ILO standards, which were written for states, not corporations, he said. Companies all too often are unaware of the far-reaching problems signing these documents creates, he said, adding that in some

instances the implications have included the displacement of longstanding local unions.

“Businesses don’t know what they’re doing,” Wilton said, underscoring an often-fragmented corporate approach to labor policy. “There is now an increasing need for companies to get their acts together to manage themselves better internally and face some of the external challenges coming through.”

USCIB Representative Sees NGOs Seeking Greater Share of Voice on U.N. Issues

Trade unions and NGOs are becoming increasingly vocal on a broad range of social issues coming before the United Nations, said Adam B. Greene, Vice President, Labor Affairs & Corporate Responsibility, for the U.S. Council for International Business. “It’s a very uneven and freewheeling environment that is ripe for organizations to focus on and move an agenda,” said Greene, whose group promotes free trade and helps represent U.S. companies in the U.N. “The issue of corporate responsibility is at the top of a lot of these agendas.”

NGOs have increasingly directed their complaints toward multinationals, shifting their activities away from individual governments that have historically been slow to respond, he said. “In many countries, if you look at basic enforcement, labor inspection, implementation enforcement, national law, there’s a lot of room for improvement,” said Greene. “(NGOs) will just say, who on a company list is big enough that we can go after? That becomes the target.”

NGOs have additionally pushed for the U.N. to embrace universal standards on human rights. The groups have offered varying degrees of support for Professor Ruggie in his role as U.N. Special Representative for Business and Human Rights. “Their heart is in getting an international U.N. treaty that will spell out the legal obligations of global companies and hold them accountable to an international tribunal,” he said.

Ruggie’s recommendations will create the benchmark for new OECD guidelines, said Greene, noting the Harvard political scientist is paying close attention to the consideration of corporations’ responsibilities in countries whose governments claim to support human rights on an international stage but neglect to do so in their local laws. “A lot of these governments have signed up to all of the human rights instruments you could think of, but they’re just not enforcing them domestically,” said Greene, highlighting problems U.S. companies face operating in these sometimes politically unstable markets.

Ruggie is also trying to get a handle on the extent of companies’ human rights responsibilities with respect to the indirect actions of their suppliers, particularly in sectors such as mining, where issues of property rights and displacement of indigenous peoples prompts NGO intervention, he said.

“You can get all the stakeholder input you want but the company itself is not going to be able to resolve something like that,” Greene said. “The government says one thing and the community says something else.”

Keynote Speaker Hector E. Morales, Jr.

Latin America Shows Strong Economic, Social Improvement

Latin America is undergoing rapid improvement to both its economies and political systems, making it increasingly attractive for multinational investment from around the world, said Ambassador Hector E. Morales, Jr., Of Counsel with Baker & McKenzie's Washington, D.C. office, in the conference's keynote address.

"The region has evolved dramatically since independence," said Morales, who most recently served as U.S. Representative to the Organization of American States. "And mass development has certainly taken place within the last 25 years." Of the 35 countries comprising the region, only Cuba is not a democracy, said Morales, noting that government leadership now includes women and people of indigenous backgrounds.

"Two decades ago, when you thought of Latin America, unfortunately it was military dictatorships, coups," Morales said. "The increased stability of the government in the hemisphere has really been quite noticeable."

Brazil, the world's eighth-largest economy, has emerged as a global power known for industries such as petroleum and bio-fuels like ethanol, Morales said. The country has also taken a proactive role in pushing for the expansion of the G8 countries to G20 under the leadership of President Lula de Silva. Brazil "really believes in multilateral approaches for political and economic issues," he said.

Mexico, meanwhile, boasts the region's second-largest economy, dependent on oil, tourism, and remittances sent back into the country by citizens working outside its borders. Despite issues with security and recent economic setbacks, the third-largest trading partner with the U.S. is expected to post economic growth of 5 percent in 2010, he said. "I'm bullish on Mexico," Morales said.

The region's newest developing economies are also worth watching. Chile, for example, is now considered the model for sustainable development in an emerging market. The outward-looking country has more than 60 free trade agreements with countries around the world, he said. "It is a pioneer in the capital markets," said Morales, adding that there are now discussions to consolidate Chile's stock markets with those of Colombia and Peru.

On human rights, Morales conceded that Latin America's track record is less than stellar, citing as an example Colombia's violent struggles against the leftist paramilitary group FARC. The OECD is not a significant force in Latin America; only Mexico and Chile are member countries, he said.

Multilateral groups including Organization of American States, the International Labor Organization, and others are working with the public and private sectors to improve human rights standards, said Morales, stressing the importance of the Summit of the Americas, a meeting every three years of the 34 democratically elected leaders in the hemisphere. "The overwhelming majority in the hemisphere is very supportive of democratic governments and the rule of law," he said. "I'm optimistic."

Labor Unrest in China: Dealing with Strikes and Wage Demands

Workers' Rights Issues Gain Ground in China, says Baker Partner

In recent months, labor strikes in China have become increasingly damaging for corporations, underscored by worker-led production halts at factories supplying auto parts to Honda, said Andreas Lauffs, a Baker & McKenzie partner based in Hong Kong who heads the firm's China Employment Law Practice.

These and other employee actions, including the dramatic suicide of a worker who jumped to his death at a Honda parts factory in Foshan, have garnered increased media attention. The latest strikes may be characterized as more strident and coordinated than those of the past, which NGOs estimate numbered more than 80,000 annually, Lauffs said.

"These were different, longer than usual," he added, noting that Chinese workers have widened their focus beyond higher wages to demands for more independent unions and better representation. "Something has been boiling up over time," said Lauffs, who has nearly 20 years experience in Chinese labor law. "Employees have a lot more legal rights and have become aware of those and realized how they can actually protect (them)." Doing business in this unstable labor environment is tricky, said Lauffs, particularly when it is frequently unclear whether or not strike actions are legal under Chinese law.

"In terms of wages, China is a really mixed country – on the one side, people think it's all now totally capitalistic and market driven – at the same time it is still a planned economy that is controlled by the Communist Party," he said. As such, trade unions in China perform double duty, representing both the ranks of workers and management, with only one union operating inside each corporation. The country does not accept independent labor unions, and unions must receive government approval, he said.

Labor unions do not agitate for strikes; their ostensible powers include compliance monitoring and the policing of workers, a role they assumed during the Honda strikes, Lauffs said.

Recent labor unrest has led to a governmental push for legislation that clarifies what constitutes a legal strike. One draft of proposed legislation from Shenzhen illustrates inherent contradictions under the Communist system: it stipulates if an employer has engaged in collective bargaining, it becomes illegal for workers to strike; if workers nevertheless engage in strike activity, it is illegal for the employer to fire them.

"They are trying all kinds of things but the real basic question is, how can you can you have a strong union if it's reporting to the Community Party?" Lauffs said. "It's all conflicted so in the end nobody can agree on anything."

In the meantime, multinationals facing strikes in China can take proactive measures to mitigate damaging effects. Legal possibilities include reducing the wages of problematic workers and making claims against those employees directly involved with damaging a company's assets, he said.

Replacing striking workers is another option, but it can result in excess workers on a company's rolls after the strike action abates. In summary, Lauffs stressed

the importance of global corporations maintaining good relationships with local government officials who can advocate on their behalf as well as becoming more proactive with public relations.

“Try to identify the people to whom you can talk,” he said. “Communication is key to all of this.”

European Works Councils and Transnational Restructuring

Europe Offers Varied Labor Landscape for Multinationals, Baker Partner Says

Europe, historically known for the protection of workers’ rights, has seen a progressive shift toward tradeoffs that give employers more control over the terms of employment, said Guenther Heckelmann, a partner in Baker & McKenzie’s Frankfurt office specializing in labor and employment law.

“It’s a quid pro quo,” said Heckelmann, noting that employers operating in increasingly open European markets have promised workers job security in exchange for flexibility over compensation, benefits, working hours, and the like. “It’s comprised of a couple of elements – secure but somewhat flexible contractual arrangements.”

Regulation supporting workers’ rights varies from market to market, Heckelmann said, noting that degrees of stringency cluster by region. Countries such as France, Spain, Italy, Portugal, and Greece are still heavily regulated, he said, while Germany, the Netherlands, and Austria tend to be more moderate.

The Nordic region has fostered a more “pragmatic consensual environment,” while Eastern Europe is fairly liberal, Heckelmann said. Meanwhile, there is a high degree of flexibility for multinationals operating in the U.K. and Ireland.

“The real issue for employers is to choose the right place of jurisdiction,” said Heckelmann, noting that a French judge may ask a corporation for a 150-page document describing the rationale behind a move affecting its workers while an Irish judge might only require a two-page document. “That’s where the real differences are, the cultural backgrounds of how these laws are interpreted.”

Even so, the recent response of local governments to cases involving workers’ rights is defying historical norms, Heckelmann said, noting a recent case in the UK where a judge sided with coalminers and another in France that limited the right of smaller trade unions to bargain collectively. Trends have been moving in favor of strengthening employee rights, he said. Citing contracts involving IKEA, France Telecom and Volkswagen, Heckelmann added that EWC agreements are attempting to create world employee bodies.

Meanwhile, the 2009 European Works Council Directive included provisions that require companies to give their workers earlier access to financially material information that could result in layoffs, such as mergers, acquisitions, and joint ventures, he said.

The latest EWC directive does not take effect until 2011, but unions have already adopted the regulations and are pushing them onto employers, Heckelmann said, adding that the language of the new directive is somewhat “fluffy” and subject to

local interpretation of the law. “What it came down to is the strengthening of information and consulting rights,” he said, later adding: “It has to be managed and adds an additional time component that companies very often underestimate.”

Latin America, The ILO Conventions and the Structure of Trade Unions

Labor Law is Public Policy in Latin America, says Baker Partner

Corporations drafting labor agreements in Latin America must be extremely precise in their language when addressing codes of conduct, collective bargaining contracts and related matters, said Carlos A. Felce, a partner in Baker & McKenzie’s Caracas office, specializing in labor law.

The main purpose of labor law in the region is to protect the rights of the workers, Felce said, noting that in court cases where there is uncertainty, judges are bound to adopt an interpretation of the law that is most favorable to the worker. “You have to be very careful to be precise – make sure what you really want to commit to is included in the text and that there is no ambiguity that people may find afterwards when reading the document in court,” he said, citing what is known as the employee protection principle.

Moreover, labor laws in Latin America are matters of public policy and cannot be waived or relaxed, even if corporations have contrary agreements with their employees. In nearly all Latin American countries, labor laws are territorial; contracts agreed to with workers in one country must be upheld even if the employee is transferred to another jurisdiction, he said.

Latin American law tends to support the so-called “reality principle” whenever there is contradiction with written labor contracts. For example, an independent contractor who has been assigned to a boss and given scheduled hours may be afforded the rights of an employee if there is a dispute in court, he said. “The principle has been used on many occasions... to rule that there was an employment relationship, where contracts written between the parties and executed might have spoken otherwise,” said Felce.

Local laws prevent arbitrary discrimination based on race or national origin, and they tend to preserve the employee relationship, he said, adding that most countries do not require that employee agreements be documented in writing. “We do protect in general terms the rights to unionize and collective bargaining and to compel the employer to collective bargaining,” he said.

Much of what is contained in the International Labour Organization’s convention already exists in local law, said Felce, but he added that ILO principles have important bearing on the region. “There is a little debate as to whether non-ratified ILO conventions must be applied,” he said. “In the case of Venezuela, and possibly Argentina... and maybe other countries, yes they may be applicable,” he said.

Felce pointed out that ILO’s Committee on Freedom of Association has been very active in Latin America, where it has reviewed hundred of cases. “It’s proven to be very helpful in connection with violations of union rights,” he said. “Even leaders that have been put in prison have been subsequently released as a result of actions of this committee.”

Union activity proliferates in Mexico, says Baker partner De Regil

Mexico maintains longstanding protectionist principles regarding workers' rights dating back to the Mexican Revolution of 1910, principles that were largely influenced by European standards, said Jorge A. De Regil, a partner in Baker & McKenzie's Mexico City office, specializing in labor law in Mexico. "In Mexico, to touch labor law has become taboo," said De Regil. "You cannot touch labor rights, you cannot touch the labor law."

Union formation requires only 20 workers, and as a result, unions have been mushrooming, representing workers in industries ranging from basic services to highly complicated industries, he said. "Just in Mexico City, in the federal district area, there are more than 600,000 trade unions registered, but there are less than 100,000 employers."

To participate in the system, a union must have a legal registration recognized by the state through a process known as "toma de nota," literally translated as taking note of, said De Regil, adding that unions can be part of state and national federations, as well as confederations. "There are some huge national trade unions," he said. Mexican unions have longstanding ties to political movements, he said, stressing the influence of parties such as the longstanding PRI (Institutional Revolutionary Party), PRD (Party of the Democratic Revolution), and the PT (Labor Party) in labor movements.

"Mexican trade unions and federations have been linked to political activity since the days of the Mexican Revolution," he said, noting that in the mining and textile industries they were the backbone of the revolutionary guard. There is also a recent tradition of corruption, underscored by the leadership of the National Union of Mine and Metals Workers. Its latest leader, Napoleon Gomez Urrutia, is living in exile in Canada after having been accused of fraud by Mexican authorities.

That group is no longer Mexico's ruling union for metallurgical and mineral work, and has been attempting to push into new fields of activity, helped by alliances with NGOs.

"The Mineros, the miners, are desperately trying to get new representation and the target, because of AFL-CIO link and support, is American companies," he said.

At the same time the NGOs, which are not membership organizations, have been involved in helping to spread propaganda that distorts companies' track records on issues such as women's rights, collective bargaining, and freedom of association, he said.

Most troubling among recent developments is the financial support that NGOs have received from major religious groups such as the Catholic Church and some Lutheran churches around the world, he said. "That's where we are beginning to have the problems in the 21st Century," said De Regil.

One corporate antidote to unionization is through the adoption of so-called protection contracts, said De Regil, which legally create a shield against strike activity. "The vast majority of U.S. companies in Mexico have a very normal and acceptable labor relations environment," he said. "They have been very careful to not support 'left-wing' groups."

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Baker & McKenzie was ranked in Band 1 for Global Employment... Sources Say: "There is nobody like it as far as the depth of its group and its consistency across different countries and continents are concerned."

Chambers Global 2010

Baker & McKenzie's Employment Practice Group is the leading practice in the PLC Which Lawyer? 2009 Yearbook, rated as leading, highly recommended or recommended in 22 countries, twice as many as any other Global 25 firm.

PLC Which lawyer? 2009 Yearbook