

The Global Employer™

The Labor Relations and Collective Agreements Issue



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The Global Employer

The Labor Relations and Collective Agreements Issue

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Baker & McKenzie's Global Employment Practice Group is pleased to present its 56th issue of *The Global Employer*[™] entitled "The Labor Relations and Collective Agreements Issue."

In this issue you will find the first report from our Future of Work Series. *Labor Relations Report - Brand Attack: How to avoid becoming the target of a corporate campaign and what actions to take if you do.* The Future of Work is a series of client reports based on panel discussions at our Global Employer Forum, a two-day thought leadership conference. During the forum, nearly 70 clients, academics and consultants gathered with our employment partners to discuss pressing workplace topics like talent shortages, data privacy, global mobility assignments, globalization of unions and managing the employment aspects of M&A deals.

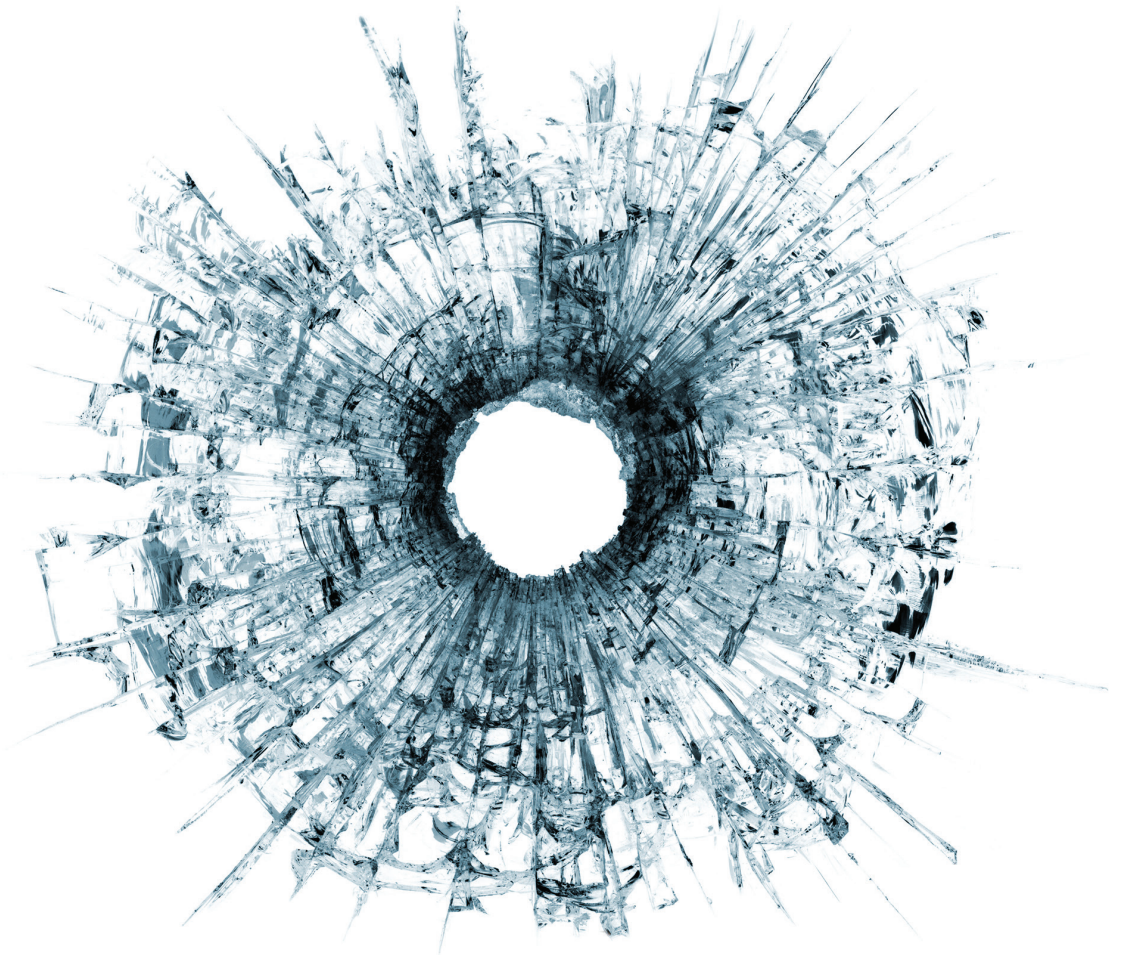
Rather than the traditional "how to" legal format of most law firm conferences, the Global Employer Forum features panel discussions of in-house counsel and senior-level executives from some of the world's largest multinational organizations who discussed their personal experiences addressing these challenges and the solutions they have found to overcome them.

Following the Labor Relations Report, you will also find information pertaining to the current state of labor relations and union negotiations in Argentina and a general overview of the current state of collective bargaining in Brazil. In Germany, we take a look at some of the numbers behind collective bargaining agreements; and a review of the impacts on labor benefits of the January 2014, Income Tax Law reform in Mexico. From Spain we bring you articles that discuss negotiating with representatives bodies in collective lay-offs and the new role of company level collective bargaining agreements; and from the US, recent efforts by the NLRB as it Targets Successor Issues in US Mergers and Acquisitions.

The FUTURE OF WORK series
Labor Relations Report

Brand attack

How to avoid becoming the target of a corporate campaign and what actions to take if you do





Today's playing field

When you mention the words “unionization campaign,” most people think of picket lines, strikes and collective bargaining tables. Although they sometimes make headlines, labor disputes have traditionally been somewhat private affairs between companies and their employees about internal issues like better wages, benefits, hours and overall working conditions.

Not anymore.

Today's unionization campaigns are more appropriately called “corporate campaigns” because they are orchestrated not just by trade unions, but NGOs, community leaders, politicians and religious groups. They attack the brand, not just the company; they target top executives and shareholders; and they focus on human rights violations — issues like child labor, human trafficking and unsafe working conditions that are more likely to garner public attention and damage the company's reputation among consumers, business partners and investors.

The purpose of a corporate campaign is still primarily to increase union membership and expand union power and influence on corporate management. The need for new members has become increasingly urgent as unions have been losing their stronghold in industrialized markets like the US, Canada and Europe as more of the historically unionized jobs are moved offshore. This decline has led to a shift in focus. Instead of organizing workers from the bottom up, unions are exerting pressure from the top down, attacking the company's reputation and advancing public policy positions through the use of corporate campaigns.

On this front, unions have partnered with NGOs to increase the strength and legitimacy of their attacks. As union membership has fallen dramatically over the past 20 years, there's been a huge rise in the number of NGOs, organizations like Human Rights Watch, Oxfam and Save the Children that have focused much of their attention and resources on pushing their corporate citizenship standards on multinational companies. Together with trade unions, they launch corporate campaigns to turn customers against companies they believe are engaged in unsafe or unethical practices and to pressure governments to take action against those that don't change their ways.

As a result, governments around the world have been imposing stricter regulations on corporate behavior, turning social responsibility issues that used to be voluntary into law. Under a provision of the 2010 Dodd-Frank Act, for example, US-listed companies must publicly disclose whether any of their products contain “conflict minerals” sourced from mines run by warlords in the Congo, a region known for human rights violations. The California Transparency in Supply Chains Act, which took effect in January 2012, requires retailers and manufacturers doing business in California to investigate and disclose what they are doing to end human trafficking and forced labor within their supply chains.

“There’s a fundamental shift taking place in the types of labor risk that companies face,” says Kevin Coon, an employment partner in Baker & McKenzie’s Toronto office. “Trade unions are a piece, and an important piece, but they’re not the whole story. Governments around the world are placing new expectations on companies to address human rights issues within their own operations and throughout their supply chains.”

Compounding the pressure, today’s corporate campaigns are more global, coordinated and sophisticated than ever before. Labor unions have become more adept at identifying and exploiting vulnerabilities in a company’s relationships with its key stakeholders, including shareholders, regulators, politicians and customers, as well as employing a variety of tactics to advance their objectives.

Organizers, for example, may send thousands of emails to a company’s shareholders asking, “Are you aware that you are investing in a human rights violator?” They challenge companies’ permit applications to open new facilities by threatening to withhold support for local politicians’ re-election bids if they approve the permits. And in one well-publicized incident in the healthcare industry, organizers tried to pressure a California hospital system into supporting the unionization of its laundry services workers by sending postcards to maternity patients suggesting that the hospitals used soiled and contaminated linens.

To gain entrée into multinationals, unions such as the United Auto Workers and SEIU in the US, employ teams of researchers who pour through SEC reports, lawsuits, government agency charges and other public filings looking for anything they can use to exploit their targets. They also research the personal backgrounds and business affairs of directors, interview former employees and review media coverage of the company looking for vulnerabilities — an exercise that with the internet, has become much faster, easier and cheaper.

Unions use this information to encourage government regulatory agencies like OSHA, the EPA and the Department of Labor to conduct investigations and audits of the target company for safety, environmental and wage and hour violations. They file, encourage and support shareholder lawsuits and other class action suits alleging sex, gender and race discrimination. They also publicize their findings on their websites and use social media like Twitter and Facebook for instant, widespread distribution to pressure the company into agreeing to their demands.

Labor unions have become more adept at exploiting vulnerabilities in a company’s key relationships.

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Unions have become increasingly agile and creative in how they approach gaining entrée into multinationals. They're looking for low-hanging fruit and they've been good about looking at areas of vulnerability by sector. The challenge is that we have to be just as agile and forward-thinking.

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Charlene Tsang-Kao
Former Deputy General Counsel
Solvay America

In Europe, a rising number of global union federations have been pressuring multinationals to sign international framework agreements. These IFAs commit signatory companies to uphold a set of minimum labor standards everywhere they operate, such as complying with minimum wage requirements, upholding health and safety standards, banning child and forced labor and allowing workers to organize and engage in collective bargaining.

Many of these IFAs include neutrality clauses that require company management to remain silent if employees in any of its operations decide to organize. Under these neutrality clauses, companies are not allowed to speak up or take any action that could discourage employees from joining the union, giving the union a decided advantage in an election. Since 2000, more than 100 multinationals have signed IFAs, including Carrefour, Chiquita, Volkswagen, Ikea and Club Med.

Many companies make the mistake of believing that as long as they maintain good relationships with their existing unions or works councils, they're immune. That's one part of the equation, but not the whole story anymore, as labor relations has grown beyond the employer-employee relationship to encompass issues like human rights, sustainability and general corporate compliance. Faced with these pressures, multinationals should develop strategies to avoid becoming the target of corporate campaigns and action plans in the event that they do.



The tangled web they weave

Trade unions are no longer standalone organizations fighting for workers' rights. Unions have increasingly joined forces with an ever-expanding list of human rights groups, legal organizations, think tanks, public policy groups, religious organizations and civil rights groups to increase union membership and advance public policy positions.



Who's at risk?

Most corporate campaigns target US and European multinationals, typically household names that are highly incentivized to protect the integrity and public image of their brand. The more concerned a company is with maintaining its reputation, the more sensitive it is to the negative publicity at the heart of corporate campaigns. Because of this vulnerability, the prominence and sheer size of multinationals make them a desirable target.

This is not to say that smaller, mid-size and lesser known companies won't find themselves in organizers' crosshairs. With the power of the internet and the growing use of social media, corporate campaigns can escalate quickly. A seemingly small labor incident in Turkey or Tunisia can suddenly blow up into international news. Union organizers know the power of these tools and use them to spread their messages in an instant, giving them the time and resources to diversify their targets.

"For the next five to 10 years, many companies will continue to fly under the radar because the unions have to be selective," says Guenther Heckelmann, an employment partner in Baker & McKenzie's Frankfurt office. "But more companies will come into the limelight than they think. The problem is that we can't determine who they are, which is why more companies need to be thinking about how they will respond if they are hit."

One major area of vulnerability, particularly for multinationals, is their operations in developing countries, where labor laws are often underdeveloped, anti-worker and poorly enforced. In fact, one reason trade unions frequently pressure US and European multinationals to sign IFAs is to enable them to organize workers in developing countries where the laws may not recognize the freedom of association and the right to collective bargaining. It's a way of coming through the back door to rebuild membership as more manufacturing and industrial jobs are offshored to countries like Bangladesh, China, Thailand and Vietnam.

In addition, because of the less developed nature of labor laws in these countries, it is often easier for unions to find labor and human rights violations to exploit. Local management may be less sophisticated in their practices and more likely to lack the knowledge and resources to comply with basic labor standards now commonplace in the industrialized world, which puts the US or EU parent company at greater risk.

"In the big developed countries, companies typically have good human resources managers and strong legal teams so the labor issues are more under control," Frankfurt Partner Guenther Heckelmann says. "It's the smaller, developing countries where there is weaker in-house staff that creates a potentially difficult mix."



How to avoid becoming a target

Most large companies have enterprise risk management systems to help their leadership assess and gauge their progress on labor relations issues. These programs, however, tend to be internally focused on traditional employment issues like whether the company has strong anti-discrimination and anti-harassment policies and effective whistleblower protocols.

Employment policies and practices are still important, but much of today's threat is coming from the outside: from trade unions, NGOs and governments that are increasingly holding companies accountable for a wide range of social, environmental and workplace issues.

"Most companies will become a target of a corporate campaign at some point," says Toronto Partner Kevin Coon. "What they need to do now is to reset the dial on their risk analyses. The new environment requires them to expand the scope of their analysis to determine, 'What are the additional risks I face against my brand?'"

So how do you make yourself a more difficult target?

Here are some recommendations to get you started on that path:

■ Conduct a country-by-country risk assessment

Although it's often cost prohibitive to conduct a labor audit in every country where you operate, it's important to conduct assessments of those that pose the greatest risk, which are typically developing markets. Countries with difficult political climates and a strong union culture are particularly challenging because the laws can change quickly and enforcement can be arbitrary, heightening the risk of noncompliance.

One US manufacturer, for example, was blindsided by a labor strike by its plant workers in Indonesia because local management was unaware of a change in local law that required the company to consult with the union during its restructuring.

Like this US manufacturer, most companies only conduct country analyses after they've been hit with a labor crisis in a particular country, which prompts them to start thinking about where else they may be vulnerable. In most instances, however, it's better not to wait.

When analyzing your level of risk in developing markets, you want to ask questions like: How stable is the political climate? Are the laws in flux? What is the labor climate? How strong are our local human resources and legal departments? What is our guidance to local management on how to handle labor disputes? Do we need to be more conservative and sensitive in how we approach potential labor disputes or can we be more bullish without suffering serious consequences?

The audit should be conducted by counsel who is familiar with the local operating environment and fed back to central management. At a minimum, it should include a review of wage and hour issues, health and safety conditions and compliance with collective bargaining agreements because those are the most common catalysts for corporate campaigns. If you have great exposure to corporate campaigns or have already been a target, your assessment should be broader than companies at lower risk.

It's also crucial to evaluate your corporate compliance program and codes of conduct. Do you have proper whistleblower and employee hotlines? Are you responding to complaints quickly and appropriately? How strong is your FCPA compliance? What's your product safety and recall history and community service record? You want to evaluate all of these issues looking for what areas could most easily be exploited, then fix them to reduce your likelihood of attack.

"If the union knows that you're a hardened target, they'll go pick another target," says Doug Darch, an employment lawyer in Baker & McKenzie's Chicago office.

■ Conduct an industry analysis

Alongside the country analysis, companies should take a close look at which issues make them most vulnerable to attack based on the nature of their business. In the textile industry, for example, use of child labor is common in the cotton-growing industry in Southeast Asia, where many multinational clothing companies source their raw materials. Child labor is also a major issue in the tobacco and sugar harvesting industries.

For chemical companies, environmental and waste disposal issues may be a soft spot. For health care companies, compliance issues related to sales and marketing practices, clinical trial activity or the cost of certain life-saving drugs in developing countries could be hooks. Based on your industry analysis, develop a checklist of the issues that corporate campaign organizers are most likely to target.

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■ Take a close look at your supply chain

Because of the outsourced nature of today's business, any risk analysis would be incomplete without an evaluation of your supply chain. Companies today depend on hundreds, often thousands of suppliers, manufacturers, transporters, brokers, distributors and franchisees to make, market, deliver and sell their products.

These business relationships are often the most vulnerable area of a multinational's operations because companies have limited control over these third parties, but great liability for their actions. In the factory fires and building collapses that killed hundreds of garment workers in Bangladesh, it was the multinationals' subcontractors who owned and maintained the unsafe buildings. Yet it was the big name retailers whose clothing they were making that made headlines.

Any enterprise risk assessment should include a review of the labor practices of your biggest, most important suppliers and other third parties to make sure they are not putting you at risk for corporate campaigns and government actions. This is not an easy exercise, considering that most suppliers, manufacturers and distributors have their own subcontractors and subcontractor's subcontractors that you may not be aware of. But it's a worthy one, given the high level of exposure.

■ Develop an action plan to fix your biggest issues

At Coca-Cola, a company viewed as highly progressive in its approach to labor relations, Ed Potter, the company's director of global workplace rights, oversaw a value-chain analysis of potential human rights impacts within its operations, franchise bottlers and supply chain from raw materials to end use. Seven of these impacts were labeled high priority issues that were presented to the company's board of directors. The company now has projects and metrics against these issues that are reported semi-annually to the board.

"There are two ways to look at labor relations: There's playing defense and playing offense," Potter said during a labor relations panel discussion at Baker & McKenzie's Global Employer Forum. "Playing offense involves making clear what you stand for and mitigating your known risk before someone else can complain about it."

Like Coca-Cola, after you've completed your country, industry and supply chain risk assessments, you should pick your top vulnerabilities and create an action plan to remedy the issues, then monitor your progress. Many multinationals, for example, have developed international labor standards programs to evaluate and address working conditions in their facilities. Others conduct regular workplace assessments of suppliers, varying the frequency based on the length of the relationship and history of non-compliance. These steps can yield valuable insights into the most common labor problems at facilities around the world, as well as issues specific to particular countries.

Countries with difficult political climates and a strong union culture are particularly challenging.

■ Create a monitoring system

The success of any action plan depends on having a system for monitoring and evaluating your progress. Making sure local managers are implementing risk mitigation measures within your organization and third parties are complying with laws in your high priority areas is one of the most effective ways to improve your company's labor profile. A strong monitoring system should give you data and input from local management on a regular basis so you can continue to measure your level of risk and decide whether to take further action.

If, for example, the number of contract employees you were hiring in a certain jurisdiction was a problem in the past, your internal monitoring should let you know whether this issue has been resolved or continues to pose a risk. Implementing a strong monitoring program and actively addressing the issues you find will also help you avoid the need to repeat more costly, in-depth audits as frequently.

■ Monitor labor law developments in high-risk countries

A big part of monitoring is staying apprised of major changes in labor law in the countries where you operate, particularly in developing markets. This often requires relying on outside advisors if you do not have a large legal staff. When choosing your advisors, you should select those who are on-the-ground in your high-risk jurisdictions because they are closest to the political, regulatory and legal developments and most likely to know which changes will be significant.

In gathering this information, you want to stay informed about the actions that governments are taking and what may be coming next, as well as which government agencies are getting funding to increase enforcement in various human rights-related areas. It is also critical to monitor non-government groups, such as the International Labor Organization, influencing the content and shape of regulation. These organization are often discussing the trends and issues that show up on government agendas a few years later.

■ Monitor global union activities and campaigns

Knowing whether you might become a target of a corporate campaign can sometimes be as easy as looking at union websites, which often list the industries and companies the unions plan to focus on in the upcoming year. You should also pay attention to any actions these groups are taking against your competitors and make sure you're not engaged in the same practices.

"You cannot Teflon-proof every area of your operations at every second, but if you're asking the right questions to identify your areas of vulnerability and addressing them, you can greatly minimize your risk," Frankfurt Partner Guenther Heckelmann says.

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■ Align your CSR strategy with your greatest areas of vulnerability

Identifying your greatest vulnerabilities can also inform the issues you target in your corporate social responsibility program. Too often the organizational structure around CSR is fragmented and key stakeholders such as those in government affairs, investor relations, communications and legal are not regularly consulted about strategy and specific initiatives. As a result, companies can face greater legal exposure and become more vulnerable to brand attacks based on broad CSR statements that companies make on their websites and in other company literature.

Developing an integrated CSR decision-making structure that includes the labor function is critical to counteracting corporate campaign claims. Although many corporate campaigns are sparked by traditional labor issues such as layoffs, low wages and poor working conditions, they can also start with claims that your company harms the environment, exploits children or denies life-saving drugs to poor populations.

An effective CSR program should anticipate the very issues you are most likely to get criticized for. If you're a fast-food company, for example, you may want to get involved in anti-obesity campaigns, such as sponsoring health screening programs and 5K races.

You should not only engage in these initiatives, but keep track of your CSR efforts and results. These steps will not only help you become a better corporate citizen, but give you positive actions to keep in your back pocket to counteract negative publicity in the event you do become a target.

■ Create a labor crisis team and develop a multi-disciplinary crisis plan

One of the biggest mistakes companies make is failing to develop a plan to address potential corporate campaigns. They have contingency plans for product recalls, supply shortages, natural disasters, and major power outages but nothing if they become the target of a major labor strike or attack on their brand.

When a labor crisis hits, they waste valuable time scrambling internally to determine who should handle it, often assuming it would fall under the purview of human resources. But today's corporate campaigns also target shareholders, consumers and top company executives. Because they are no longer confined to internal issues between the company and its workers, they are often beyond the scope of HR.

Typically whoever's in charge of the company's labor relations function would serve as the point person for preparing for and handling these crises. They would typically have overall responsibility for executing the contingency plan and directing the response to the attacks in collaboration with task forces with representatives from the appropriate departments, such as communications, government affairs, public relations, legal, compliance, CSR and HR.

■ Make friends

Trade unions and NGOs have many allies in the community and you should, too. It's important to establish strong relationships with politicians, religious leaders, business associates, vendors and other community organizations you can call on for support, especially when issues arise such as a union that is trying to block you from getting regulatory approval or operating permits.

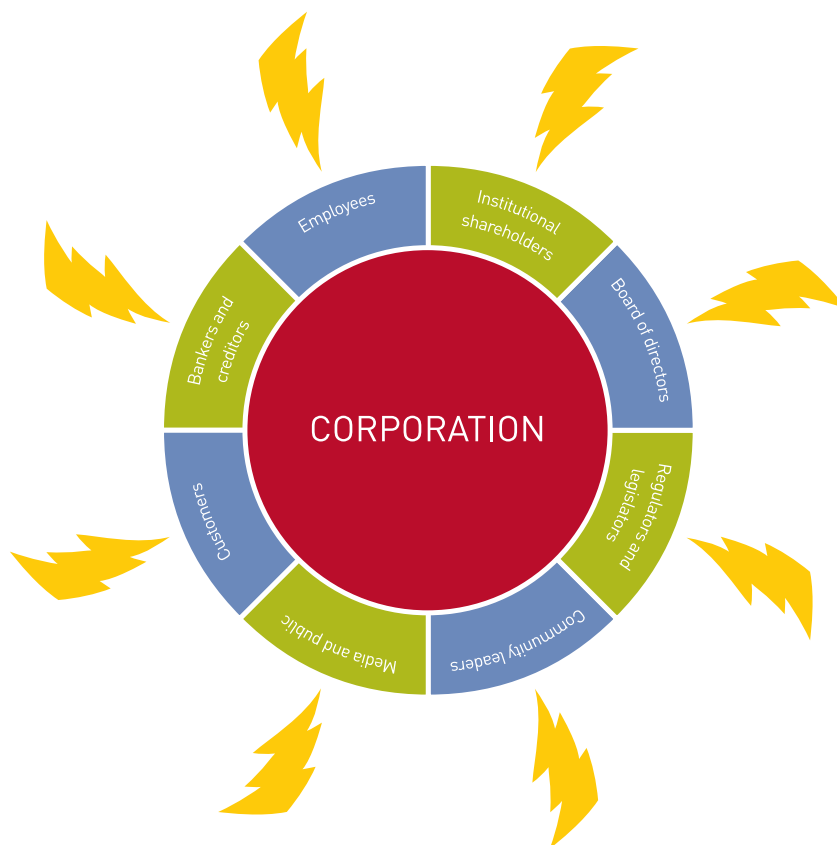
A good way to forge these relationships is through your CSR efforts, such as sponsoring sports teams, sustainability efforts and other activities that benefit the community. It's also effective to analyze your benefit to the community by gathering statistics such as the number of people you employ, the local merchants you support, the vendors you do business with, the construction and energy companies you use and the local taxes you pay. This data can help you paint a clearer picture of how much you contribute to the community and how valuable you are.

Join voluntary industry initiatives

It's also important to build good relationships with fellow industry members. Joining industry initiatives to address the human rights issues in your sector can provide you with a forum for sharing information about current and future labor trends and campaign tactics, as well as help you maintain a positive public image. From a public relations perspective, it can also serve as an effective defense for refusing to sign an IFA, as you can point to your industry efforts and corporate code of conduct to show that you are already addressing pressing industry issues.

Union attacks via stakeholders

The power structure of any corporation is built on the strength of its relationships with key stakeholders whose support is critical to the company's success. The goal of a corporate campaign is to create a negative image of a target company to polarize those relationships and weaken that support. Because of the negative perceptions, for example, banks may deny the target company financing or local legislators may reject its application for an operating permit. By undermining its power structure, campaign organizers hope the target company will become more receptive to their demands.





What to do if you become a target

After you've done all this work to assess your vulnerabilities, take remedial action, improve your corporate compliance, monitor international labor trends and create multi-disciplinary teams, you may still find yourself the subject of a corporate campaign. The good news is that you have already done a lot of the legwork to minimize the damage.

"Companies that have rigorous compliance programs and vigorous corporate social responsibility campaigns are going to be able to weather most of these storms because they're prepared, they don't have a litany of missteps and people will be more likely to give them a pass if they make a mistake," Chicago Partner Doug Darch says.

So what do you do if you become a target?

Here are some recommendations to help you if you do become a target:

■ Don't ignore it

A common reaction many companies have when a labor issue erupts is to ignore it and hope it goes away. In the last five years, however, the pace of corporate campaigns has sped up exponentially. Using the internet, social media and smart phones, campaign organizers are capitalizing on these advances and becoming more effective at using technology to publicize their messages.

They post labor incidents on their websites and launch electronic letter-writing campaigns targeting shareholders, local government officials and even company CEOs. Some companies have had to shut down their CEO's email accounts because of the thousands of messages flooding their inboxes.

With these campaigns ramping up so quickly, companies have much less time to respond before finding themselves on the defensive. That's why it's so important to stay alert and take action at the first sign of trouble.

■ Prepare a template press release and talking points

Given the speed at which corporate campaigns can unfold, companies should be ready to launch a counter-campaign to combat false and misleading information as well as communicate with employees and other stakeholders targeted by the union's campaign.

To keep your message consistent, it's a good idea to prepare a press release template and talking points in advance. Then when you are hit with allegations, you can tailor the template to the specific circumstances and avoid having to start from scratch under pressure. You should also update the template as needed with pertinent statistics and additional information.

■ Tell your own story

Once your brand is under attack, now is the time to bring out your list of CSR efforts to counteract the negative publicity. This is not just a matter of demonstrating that you're a good corporate citizen, but demonstrating that you understand the risks in your industry, take them seriously, and are doing what you can to be part of the solution.

When countering negative claims, multinationals should take advantage of their financial resources, which are often much greater than those of the unions and NGOs attacking them. These resources can help companies launch their own media campaigns to dispel false claims and promote their positive actions within the local community.

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I've always believed that the most effective way to stop a corporate campaign is to be prepared, and if the union makes a mistake, be ready to capitalize on it.

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Doug Darch

Employment Partner
Baker & McKenzie

■ Consider a counterattack

In some cases, it may be helpful to not only respond to the corporate campaign's allegations, but to attack the union itself: Are there improprieties in their financials? Have they failed to represent employees? Have they ignored workers' rights?

"I've always believed that the most effective way to stop a corporate campaign is to be prepared, and if the union makes a mistake, be ready to capitalize on it," Chicago Partner Doug Darch says.

Launching this type of attack requires conducting research on the union and its officials to uncover information your public relations and media relations department can use to disarm or discredit the union. Sources of information could include copies of unfair labor charges filed against the union by its members (particularly charges alleging the union ignored employee rights or failed to represent their interests), a summary of the union's strike record (where the strike occurred, how long it lasted, how the employer responded, what the outcome was), and a summary of provisions in the unions constitution (due and assessments, fines and penalties, etc.) Companies should also examine whether the groups involved in making the claims have their own political or financial motive for attacking the company's reputation.

But this must be done carefully to keep from backfiring and may not be an appropriate strategy in many parts of the world. In the US, for example, it may be effective to play hardball by challenging the legality of the union's tactics to put them on the defense. Companies could seek court orders requiring the union to remove banners they've posted outside of company headquarters or file lawsuits if allegations rise to the level of defamation, extortion, trademark infringement or unfair business practices.

In places like Europe, however, which have much stronger labor union cultures, taking legal action could make things worse by bringing more unwanted attention to an already tense situation. In all cases, regardless of location, you must carefully weigh which strategies are likely to be most effective in responding to the campaign while preserving your reputation.



The way forward

In an era of growing social consciousness, increasing regulation and instant communication, the demands on multinational companies to monitor their conduct and that of their business partners will only increase. Now that trade unions have expanded their strategies to encompass human rights issues and partnered with NGOs and other community organizations to win public support, companies are likely to experience ever-mounting pressure.

Going forward, we are likely to see more corporate campaigns that target company shareholders, customers and business partners because these comprehensive campaigns have the best chance of getting the immediate attention of top management. We are also likely to see more labor and human rights protections codified in legislation, bilateral trade agreements and business contracts. Many banks, for example, now require companies to comply with international labor and human rights standards before extending project funding or credit insurance.

Despite this ever-expanding list of obligations and the dangers that corporate campaigns can pose to a company's operations, there are important steps companies can take to protect their brand, their workforce and their reputations.

Labor relations: Three perspectives

THE UNION PERSPECTIVE:

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To be successful in organizing, I believe you have to be relentless. We are not businessmen, and at the end of the day they are. If we're willing to cost them enough, they will give in.

”

Bruce Raynor

Former Executive VP
SEIU, Workers United and
UNITE HERE

THE CORPORATE PERSPECTIVE:

“

There are two ways to look at labor relations: There's playing defense and playing offense. Playing offense involves making clear what you stand for and mitigating your known risk before someone else can complain about it.

”

Ed Potter

Director of Workplace Rights
Coca-Cola Company

THE LEGAL PERSPECTIVE:

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The main problem with international framework agreements is that they come off as being boilerplate in granting basic worker rights, but really they're not. The seemingly easygoing language can quickly be transformed into hard union rights.

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Guenther Heckelmann

Employment Partner
Baker & McKenzie

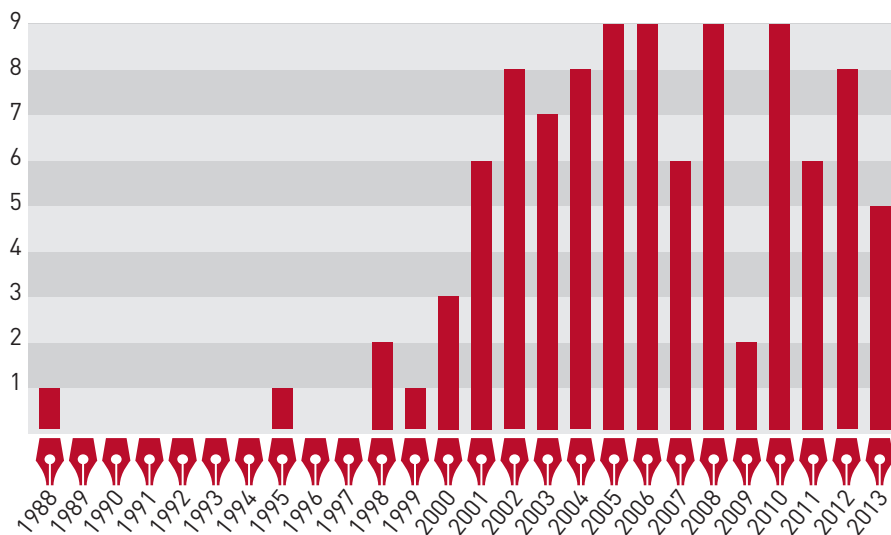
What's so wrong with signing an IFA?

On its face, signing an international framework agreement may seem harmless. Many of them resemble a company's code of conduct, with their aspirational commitments to equal opportunity, health and safety, minimum wage standards and the banning of child or forced labor.

But unlike codes of conduct, which are unilateral, voluntary statements adopted by a company, IFAs are bilateral agreements between companies and a global union federation. Many of them commit the company to meet standards that are higher than local laws, in areas such as giving workers the right to organize and agreeing to engage in collective bargaining. Many IFAs also contain neutrality clauses that prohibit management from discouraging the union's efforts to organize, while others require employers to recognize the union based on a card check.

Under this secret ballot system, union organizers usually work in teams to gather "authorization cards" signed by individual workers rather than holding elections, which greatly increases the union's chances of succeeding. In a typical US National Labor Relations Board election, employees vote for union representation approximately 60 percent of the time. Under the card check system, the union approval rate increases to 90 percent.

Number of IFAs by year



Unlike codes of conduct that are created and monitored by the companies themselves, IFAs often give the global union federation the right to raise alleged breaches of the agreement with corporate headquarters and establish regular monitoring meetings with top management. The global federation can also intervene to defend local union efforts if local managers are violating the IFA.

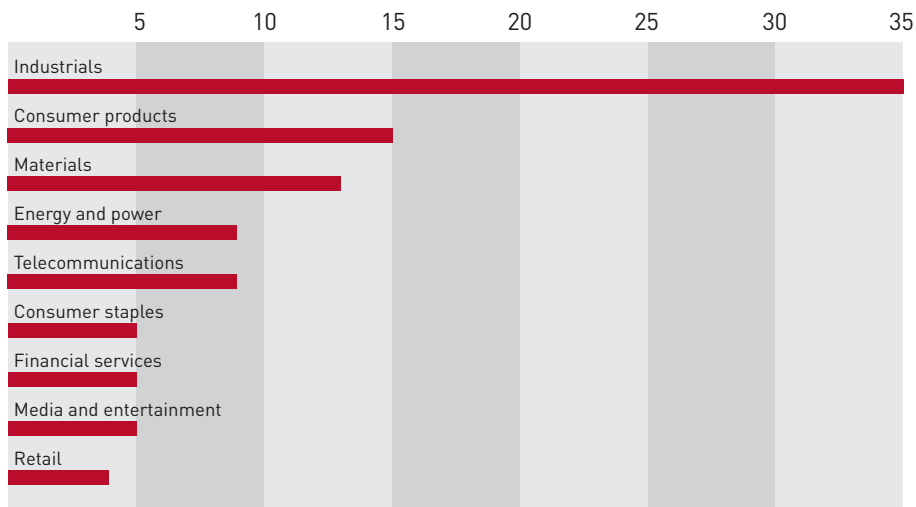
With so many repercussions, why do so many companies agree to sign IFAs? Fear of adverse publicity, anxiety about economic losses due to demonstrations and the desire to be labeled a good corporate citizen are just a few of the reasons. It's no surprise that 81 of the 100 multinationals that have signed IFAs are based in the EU, which has a worker-friendly labor climate where business practices like consulting with works councils are more common and accepted.

Another reason for signing an IFA could be ignorance of what it really requires and how onerous those requirements can be. A common provision of an IFA states, "We commit to translating collective bargaining agreements into the local language," which sounds reasonable enough. But in your factories in India, you could have workers who speak up to 180 dialects. Are you required to translate the document 180 times?

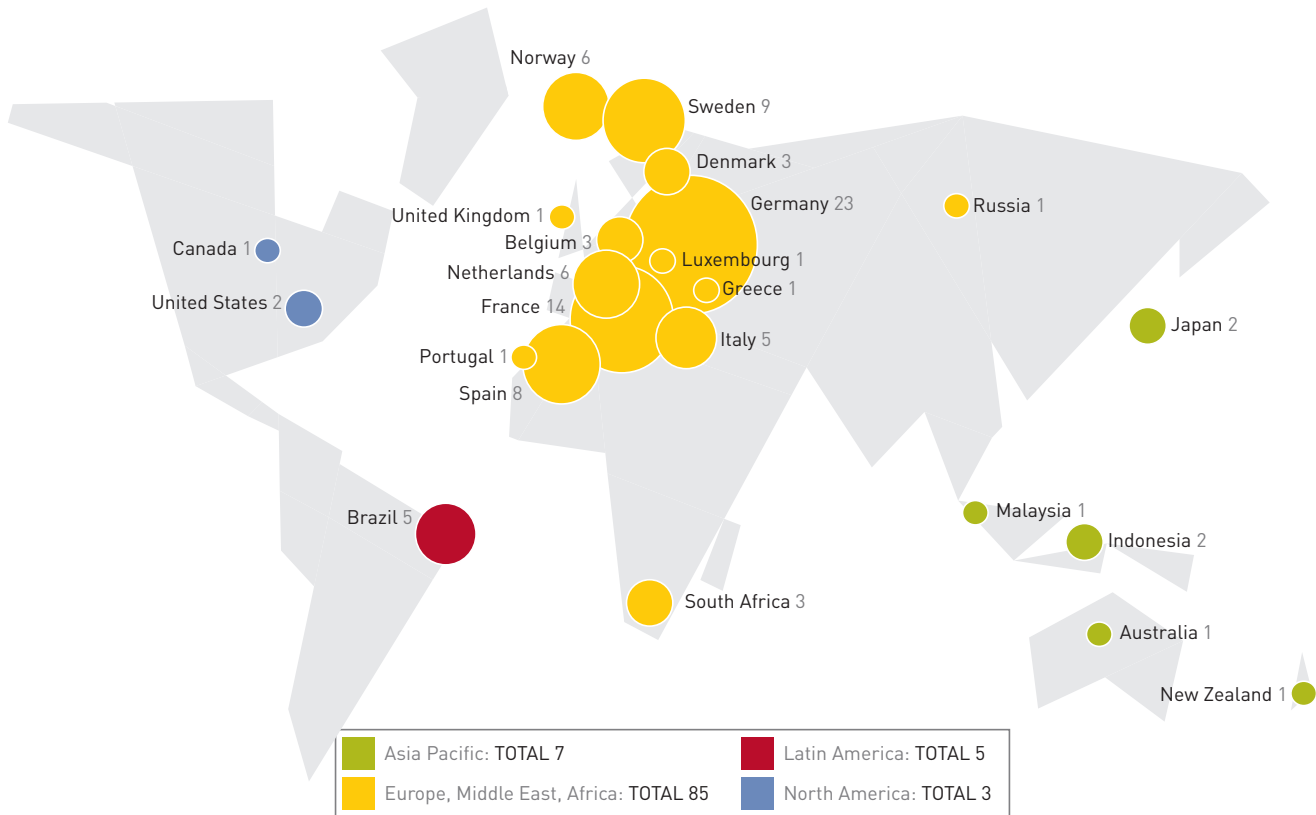
Another statement in an IFA could say, "We commit to respecting workers' rights," which also sounds innocuous. But for your operations in the US, where this provision could be interpreted to mean the right to associate, you could be accused of violating the framework if you do anything to fend off a unionization campaign.

That's why it's so important for those who oversee labor relations at multinational companies to educate their top executives on all the implications of signing IFAs. Having this information can help the leadership make more-informed decisions about whether it's the right action to take. It's also a good idea for your company to have a list of reasons why it won't sign an IFA, if that's the decision you make, to better explain your position to management, employees and the general public so that it doesn't become an issue that turns into an attack.

Number of IFAs by industry



Number of IFAs by country



Labor relations: The downfall of M&A?

Companies often overlook the importance of assessing the labor relations implications of a merger, acquisition or other business deal. During due diligence, companies are busy analyzing the target's financials and reviewing its business and employment contracts to ensure they are in order. They are more focused on whether the target is a good investment from a financial or growth perspective than whether labor complications could erode the value of the deal or derail it altogether.

But failing to evaluate labor relations issues during M&A due diligence can lead to unpleasant surprises after the deal has closed, such as unknowingly inheriting an IFA signed by the target company. In one such instance, a US company merged with a European company whose CEO had signed an IFA with a global union federation in Europe. The US company was then faced with having to comply with the terms of the IFA, one of which was to remain neutral during a union organizing campaign. A subsequent inquiry discovered that no one on the US deal team had reviewed the global-level labor agreements the European company had signed before the two companies merged.

Because of potentially serious consequences like these, it can be a valuable exercise to include a labor relations assessment in your M&A due diligence. Your due diligence questionnaire for the target company should ask questions like: What is your relationship with unions? Have you been subject to union attacks? What is the labor climate like at your company? (*i.e.* controversial, confrontational, congenial) Do you adhere to minimum wage and labor standards in the countries in which you operate? Are you above or below those standards?

Multinationals can also indirectly become parties to IFAs through other types of business arrangements, such as partnerships and supplier contracts. That's why the due diligence in any acquisition, partnership, majority supply contract or procurement agreement should include a review of the other party's:

- Compliance with local labor and human rights laws and customs
- Compliance with core international labor and human rights conventions
- Level of union presence or influence within the company
- Level of union presence and density in the country
- Memberships or commitments to international organizations or NGOs
- Codes of conduct and supplier policies

"In every kind of business decision, whether it's a product launch or geographic expansion, you have to assess the labor relations implications right from the beginning," said Essex Mitchell, divisional vice president of employee relations at Abbott Laboratories, during a labor relations panel discussion at Baker & McKenzie's Global Employer Forum. "You have to make sure you have all the appropriate groups at the table so that everyone understands what they have to do to get the best outcome."

The Future of Work Series

The Future of Work is a series of client reports based on panel discussions at our Global Employer Forum, a two-day thought leadership conference we first hosted in September 2013. During the forum, nearly 70 clients, academics and consultants gather with our employment partners to discuss pressing workplace topics like talent shortages, data privacy, global mobility assignments, globalization of unions and managing the employment aspects of M&A deals.

Rather than the traditional “how to” legal format of most law firm conferences, the Global Employer Forum features panel discussions of in-house counsel and senior-level executives from some of the world’s largest multinational organizations who discuss their personal experiences addressing these challenges and the solutions they have found to overcome them.

Based on the hottest topics arising out of those panel discussions, we create these reports to share the current trends on these issues, insights from members of major multinational organizations, academia and government agencies on how they are navigating these trends, and the legal expertise of our lawyers who are on the front lines advising clients on the shifting employment landscape. We hope you find these reports helpful in meeting the new challenges of managing a modern workforce.

Argentina



2014: A year of challenges for the government and the Unions

Unlike any other time during both the current and the preceding administrations, Argentina's national government is facing a very challenging environment in connection with union matters.

A government that used to enjoy almost unanimous support from both unions and workers, is now struggling to reach collective agreements within the below 30 percent salary increase cap it promoted at the beginning of this year.

While there are many reasons behind the government's struggle, the primary one is that since January 2014 the government has published a new inflation index which acknowledges a much more realistic increase in general prices. Therefore, unions now have official statistics, to some extent more trustworthy than the previous ones, on which they base their salary increase claims.

The new index reflects an accumulated inflation rate of 10 percent for the first trimester. This, together with the 20 percent devaluation of the Argentine Peso in January of 2014, has led to very challenging salary negotiations with the Unions, as the latter are demanding salary increases exceeding the government imposed cap.

To date, the administration has only managed to agree on increases within the below 30 percent cap with the following government-aligned unions: Metallurgical Workers (26.5 percent), Construction Workers (29.6 percent), Commerce and Services Workers (27 percent) and Maritime Workers (26 percent).

Non-government aligned unions that refused to accept the salary increase cap "proposed" by the national administration, called for a general strike (the second one in Ms. Fernández de Kirchner's administration) on April 10. The strike was led by Messrs. Hugo Moyano Luis Barrionuevo and Pablo Miceli, heads of three of the five existing Union Confederations.

As a result, salary negotiations remain challenging. Continued negotiations should be closely watched to monitor whether the government manages to successfully obtain agreements on salary increases between workers and employers' representation in activities

where union representatives are not aligned with the national government, and/or if the unions are willing to settle for increases within the below 30 percent cap, after having called for a strike.

In order to mitigate the effects of an ever-increasing inflation rate, several unions such as those of Rail Workers and Bank Workers have agreed on the payment of fixed sums with the promise of future salary increases.

It is worth pointing out that, in some cases, salary negotiations have also included non-remunerative allowances, despite the fact that these were challenged by the Supreme Court of Justice with the understanding that these payments must be of remunerative nature in compliance with international labor regulation.

Moreover, the fact that the government is approving salary agreements which include the granting of non-remunerative allowances - something that the Federal Tax Authority

("Administración Federal de Ingresos Públicos" "AFIP") had been trying to reduce in the past, clearly reflects the importance of the issues at stake for the administration.

It is hard to predict how the current situation with unions will evolve during

2014. However, one should keep in mind that 2015 will be an electoral year in Argentina. The 2015 presidential election may have a direct impact on Government strategy regarding union issues. The government may try to gain union support prior to the 2015 elections.

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Brazil



Collective agreements in Brazil: One agreement, two purposes

In Brazil, collective agreements have two different purposes: (i) normative aspect, since the clauses of a Collective Bargaining Agreement may create an obligation for each party involved in the negotiation; and (ii) conflicts resolution, since the parties may use such instruments in trying to solve a conflict and, thus, avoid having to look to the Labor Court (in general related to health and safety, overtime, salary rise and other service conditions). The name usually given to a Collective agreement is Collective Bargaining Agreement ("CBA").

There are two different types of CBAs.

One type of CBA that is executed between the Labor Union that represents the economic activity of the company (employer) and the Labor Union that represents the professional category of the employees linked to such economic activity. In this case, it is important to highlight that the rules established in such Agreements should be observed by all companies

represented by the employer's Union and not just for a single company. It is also called Collective Ruling (*Convenção Coletiva*).

The second kind of Collective Agreement is the one executed between a Company directly, and the Labor Union representative of the employees, creating rules only for such company in relation to its employees.

In both cases, the rules established by the CBA will create an obligation between the parties who have signed the instrument, and such conditions will integrate the Employment Agreement for all legal effects for the period the agreement is in force. The labor Law establishes that a Collective agreement can only be executed for a maximum period of two years (any extension of this period provided in the Collective

Agreement is considered null and void], but it is generally executed to last for one year, counting from the date of its execution (Data Base).

As the date of the execution of the Collective Agreement varies according to each category, what we call Data Base and sometimes the negotiations, which can last for more than a month before an agreement is reached, the benefits granted in a given Collective Agreement sometimes expire before another agreement is duly-signed. For this reason, there used to be a gap between the expiring date of the Collective Agreement and the date of the execution of a new one.

In such cases, the new agreement provided for a retroactive clause and some rules and benefits were considered not due for the period of negotiation. This exposed companies to a labor risk, such as payment of overtime when a Collective Working shift agreement expired, and a new one had not yet been executed.

To avoid further discussions in relation to benefits, rights and rules provided in an expired Collective Agreement,

in September 2012, the Superior Labor Court edited Precedent # 277, recognizing that the conditions established in the Collective Instrument should only be modified or suppressed through a new Collective Agreement between the same parties, under the penalty that such modification or suppression be considered null and void.

It is also important to highlight that although it is possible to negotiate new rights and benefits in the Collective Agreement executed only between the Company and the employee's Union, in the event that the instrument creates an obligation that goes against another rule, related to the same nature (overtime, for example), established by the CBA executed between employee's and Employer's Union, the company must apply the rule that is more favorable to its employees.

Labor Unions (employers' and employees') periodically negotiate salary increases and other rights, and whenever an agreement is not reached, both parties can file a Collective Claim called *Dissidio Coletivo* in the

Labor Courts for a decision on the controversial terms. In this situation, the Court will issue a decision that will become part of the Collective Agreement.

In our experience, the Unions usually reach an agreement before submitting controversial terms to a labor Court since, in these cases, the decision takes too long to be issued, the Regional Courts tend to be more protective to employees and the decision issued does not usually represent the best alternative for the company.

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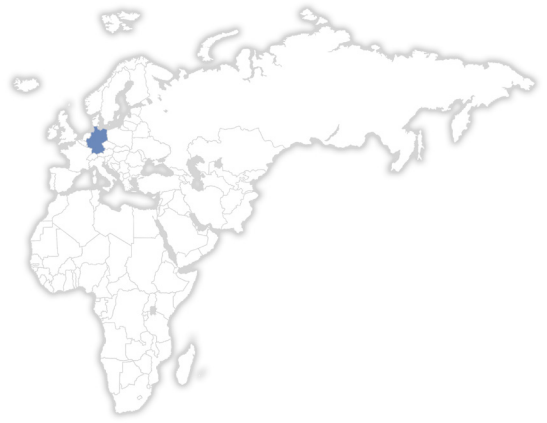
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Germany



The german collective landscape in 2012/2013 – facts and figures

The German landscape of CBAs and works councils is not a fixed structure, but is subject to ongoing changes which can sometimes be difficult to track. After the government's election and the establishment of the Grand Coalition at the end of 2013, the discussions about the statutory minimum wage and pay equity ("equal pay for equal work") particularly concerned both employees and employers. It is worthwhile, therefore, to keep developments in the collective sector in view.

Introduction

In Germany, two different kinds of collective bargaining agreements (CBA) with trade unions are known. The more common one is the CBA concluded above company-level between the trade union and the employers' association for a specific industry, however, typically limited to a certain territory within Germany. Besides these industry-wide agreements, trade unions may also conclude company-specific CBAs either with the employers' association, or directly with an individual employer under specific conditions. Both forms of CBAs typically regulate working conditions, in particular remuneration (including bonuses and other benefits), working hours, notice periods and holidays. Contrary to widespread opinion, the conclusion of a CBA is possible and occurs in (nearly) all industry sectors, including financial and insurance services.

Facts – CBA and Trade Unions

At present, about one in two employees is bound by an industry-wide CBA in Germany, another eight percent are bound by a company-specific one. Figures state that approximately 77 percent of the employees in the financial and insurance sector were bound by an industry-wide CBA in 2012, and another three percent by a company-specific one.

On the companies' side, 29 percent of the ones located in Germany are party to an industry-wide CBA, and another two percent to a company-specific one. The tariff commitment of companies in the financial and insurance services sector is above average. In 2012 in 40 percent of these companies an industry-wide CBA applied, and in one percent company-specific one. Even if more than half (69 percent) of all companies are therefore not bound by a CBA, 42 percent align themselves with the collective regulations.

In 2013, 30,136 industry-wide CBAs were in force in East and West Germany, of which 1,960 were newly registered within the last year. At present 501 CBAs are declared as generally binding by the Federal Ministry of Labor and Social Affairs meaning that the CBA's collective regulations apply to all employers and employees falling in the material and territorial scope of the agreement, irrespective of the fact whether the employer is a member of the employers' association or the employee a member of the trade union. The building sector (total 207 CBAs) and the economic area of glass/ceramic/stone/earth (total 77 CBAs) have the highest number of generally binding CBAs. The Federal Ministry of Labor and Social Affairs provides a register of all current valid generally binding CBAs on a regular basis.

With an additional 3,787, altogether 39,630 company-specific CBAs were in force in Germany in 2013 divided

among 10,384 companies (which means an increase of 2.6 percent on the company side in 2013). In this regard, companies associated with the public administration and social security sector, (eight percent) and companies in the area of energy/water supply/waste disposal/mining (six percent) were contracting parties to company-specific CBAs at an above average rate.

Works Councils

According to German law, the establishment of a works council is possible (not mandatory) in establishments with at least five regularly employed workers, of which at least three have to be eligible to stand for election. In about nine percent of all private companies located in Germany with five or more employees, a works council has been established whereby the figures state that the employer's chance to face an employee's representation increases with the number of employees in its establishment. For example, although only six percent of the companies with five to 50 employees have a works council, 77 percent of the companies with 200 to 500 employees and 86 percent of the companies with 501 and more employees have one. An above average number of works councils have been established in private companies in the energy/water supply/waste disposal/mining sector (40 percent) and the financial and insurance services sector (23 percent). Conversely, only three percent of the private companies in the building sector and three percent in the catering and hotel industry (and other services) have a works council.

Union Wage Rates / Minimum Wage

In 2013, the union wage rates increased in real terms (*i.e.*, after the deduction of the inflation rate of 1.5 percent) by 1.2 percent on average.

At present, a minimum wage is only mandatory for single industries, mostly regulated by industry-related CBAs in accordance with the German Act on the Posting of Workers ("*Arbeitnehmer-Entsendegesetz*"). In 2013, the collectively agreed minimum wage was increased in various industries. In total, 13 industries (including main construction trades, electrical trades and the nursing care sector) are currently subject to the generally binding tariff minimum wage. Furthermore a minimum wage level applies to the contract/temporary work sector according to the German Temporary Employment Act ("*Arbeitnehmerüberlassungsgesetz*"). A draft law, which is currently in the legislative process, provides for a uniform statutory minimum wage of EUR 8.50 per hour for all industries throughout Germany. The law, if passed, would become effective January 1, 2015.

Outlook

It remains to be seen how the German CBA and the works councils' landscape will develop in 2014 and the coming years. The regular works councils' elections for the next four-year term were completed on May 31, 2014. Many companies now face a new representative body.

Furthermore, the German government has proposed a new law strengthening the tariff autonomy. The draft law provides on the one hand, as already mentioned, the implementation of a statutory minimum wage applicable to all industries throughout Germany. Conversely, it will be possible for the Federal Ministry of Labor and Social Affairs to declare an industry-related CBA as generally binding under simplified conditions.

Of further interest in this regard is the principle of collective agreement unity. This principle, which states that only one CBA shall apply in one establishment (even if multiple ones exist), had been settled in case-law over decades, but had been explicitly abolished by the Federal Labor Court in 2010. The agreement of the grand coalition now provides for the statutory reinstatement of this principle. It remains to be seen how this will be accomplished.

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Mexico



Who bets in the future?

On January 1, 2014, a major Income Tax Law reform entered into force with significant impact on labor benefits. Fringe benefits that were exempt for workers (and were 100 percent deductible for employers), now will only be deductible up to 47 or 53 percent depending on whether the employer maintains the same benefit and compensation package that was in effect prior to January 1, 2014.

This tax impact has marked the collective negotiations process for 2014 as to the extent employers are already charged with this economic cost aside from the annual review of their collective bargaining agreement.

Currently the real challenge for trade unions and employers is in connection with the workforce already covered by collective bargaining agreements, specifically those agreements that have been in effect for more than three decades. Those collective agreements normally contain fringe and social welfare benefits that have important tax advantages for both parties, such as savings funds, punctuality bonuses, and employees' quotas to Social Security paid by the employer among others. While not taxable for employees, these benefits were 100 percent deductible for employers for income tax, and

did not increase the salary basis for Social Security and Housing Agency contributions.

Food coupons, savings funds, overtime, punctuality and perfect assistance bonuses, and supplementary contributions made by employers to create or increase Pension funds were included in the collective bargaining agreements with the intention of providing more cash flow to employees, and to allow them to have a better compensation package or future retirement benefits. Moreover, old-time collective bargaining agreements and most of the Compulsory Bargaining Agreements (*i.e.* Compulsory Bargaining Agreement for the Rubber Industry) used to include the obligation of employers to pay employees' social security contributions.

Additionally, when the employer (as a taxpayer) has unionized and non-unionized employees, the deduction is conditioned on the fact that those disbursements are equally averaged for each non-unionized worker, in an equal or lesser amount than the deductible expenses for the same concept made by each unionized worker. Furthermore, the ability to deduct employees' social security contributions paid by the employer is now being eliminated.

These new tax dispositions directly impact the payroll cost of Mexican employers, and impose an additional burden on 2014 collective negotiations. According to accounting and tax experts, the immediate impact of these dispositions on the payroll cost may vary from three to seven percent in each case.

Benefit	Law Prior to 2014 ISR Reform		2014 ISR Reform	
	Employee	Employer	Employee	Employer
Savings Fund	Exempt Income	Deductible as long as it does not exceed the established legal limits	Without modification	The taxable income is 100% deductible for the employee. As for the exempt income deduction the following limits must be applied: A) 53% deduction of the exempt income or, B) 47% deduction of the exempt income, if the benefit has been reduced in the previous fiscal year.
Attendance and Punctuality bonus	Exempt income up to 30 days of minimum Wage	Deductible		
Productivity Bonus				
Christmas bonus				
Overtime	<p>Worker with Minimum Wage: Exempt only when it does not exceed the established minimum limits indicated by the labor law.</p> <p>Worker with more than one minimum wage: 50% exempt only when it does not exceed the established limit indicated in the labor law and if this exemption does not exceed the equivalent of five times the minimum wage of the employee's geographic zone for each week of services</p>			
Vacation Premium	Exempt up to the equivalent of 15 days the minimum wage of the employee's geographic area			
Sunday Premium	Exempt up to the equivalent of one minimum wage of the employer's geographic area for each worked Sunday		Exempt up to the established limit indicated on the Article 93, penultimate paragraph of the labor law	Deductible only up to 53% if granted through electronic payment. If the benefits are reduced in the previous fiscal year, it would be deductible only in a 47%
Food Coupons	Exempt up to the established limit indicated on the Article 109, penultimate paragraph of the labor law		Not considered as income	Deductible, as it is not considered an income for the employee
Insurance premium	Not considered as income		Without modification	For the deduction of the exempt income the following limits must be applied: a) 53% deduction of the exempt income, or b) 47% deduction of the exempt income, if the benefit has been reduced in the previous fiscal year
Private pension funds contributions	Exempt up to 90 times the minimum wage for each year of service at the moment of receiving the benefit			
Employment termination payments				
Old-age or early retirement pension funds contributions	Not considered as income			
Social security contributions	Exempt income			
Profit Sharing	Exempt up to the equivalent of 15 days the minimum wage of the employee's geographic area	Is a concept that reduce the income tax result, therefore it is not a deduction for income tax purposes		Non-deductible
				Without modification

In the first months of 2014, Companies have analyzed the possibility of converting to salary, fringe benefits currently granted that will be impacted by the Tax reform. This process is commonly known as "Monetizing." So far, these cash conversions do not appear to be a viable option since they will have an impact on other benefits. (e.g. vacations, vacation premiums, social security and housing agency contributions, and tax withholdings applicable to employees).

In general terms, salaries included in collective bargaining agreements are reviewed on a yearly basis, and other contractual terms and fringes are negotiated at two-year intervals. These negotiations are generally marked by two official factors: an increase to the minimum wage, and the annual inflation rate.

For 2014, the minimum wage was increased by 3.9 percent and the

official inflation rate was around four percent. Adding the direct impact of the tax reform in the payroll cost, plus the expected salary increase based on the above-mentioned parameters represents a major task for Mexican employers in this year's collective negotiations.

New formulas to substitute the already affected fringes and social welfare benefits must be found, not only to secure the net income of employees but also as means to retain the workforce and enhance the productivity and competitiveness of Mexican companies.

Alternatives are on the table: differentiated salary increases may be granted among categories of workers or lines of production that are tied to productivity. The modification and inclusive cancellation of those benefits and prerogatives earned by workers by virtue of time should be revisited in collective negotiations

in order to secure the viability of the working centers. New alternatives to compensate the workforce, secure their net income and also provide improved results on production must be found.

The renewal of the collective bargaining agreements and the mechanisms to review them is a task that cannot be left for generations to come. Flexibility and productivity should be the common denominators and main objectives.

Collective negotiations must assume and adopt the necessary changes to confront the profound transformations experienced by globalized economies. Unions and employers must review the deficiencies and distortions created by past negotiations that are not longer permitted.

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Spain

The new role of company level collective bargaining agreements as an instrument of flexibility and adaptation of working conditions



Until February 2012, when new labor reforms went into effect in Spain, company level collective bargaining agreements were generally applied on a subsidiary basis with respect to broader (industry-wide) collective bargaining agreements (“CBA”). This meant that when a CBA with a broader scope applied to a company, the company could only negotiate a company level CBA that enhanced the working conditions of the broader (but could not worsen them), thus making the labor market less dynamic and less competitive since working conditions could not be suited to each particular company.

Recent labor reforms have attempted to reinforce company level CBAs and make them more applicable and enforceable.

Company level CBAs now have priority over industry-wide agreements in certain core working conditions (salary, job classification, timetable and working hour distribution, type of contract, etc.), allowing companies to adapt (and even worsen) those conditions even if they are already regulated by a CBA with a broader scope of application.

Initial court rulings on the matter have confirmed the leading role of company level cCBAs. The National Court

(“*Audiencia Nacional*”) Labor Chamber Ruling issued on May 29, 2013 concluded that:

- There is a need to promote the competitiveness of companies based in Spain as a key factor in overcoming the economic crisis,
- CBAs must be a useful instrument, and not a barrier to companies being able to adapt to changing markets,
- It is legitimate, if the negotiators agree, for company level CBAs to make the necessary and possible adjustments based on new legislation, in order to make labor relations

more flexible and promote the competitiveness and adaptability of companies based in Spain to market requirements.

Additionally, a National Court (“*Audiencia Nacional*”) Labor Chamber Ruling issued on May 31, 2013 held that industry-wide CBAs cannot include provisions that are contrary to the new priority rule relating to company level CBAs, and that all contrary provisions will be deemed as null and void.

As a result of the above, we are observing that many companies are requesting advice on how to implement

the possibility of negotiating a company level CBA and how this agreement can include new solutions on working conditions that fit in with company needs. As an example of these solutions, company level CBAs are progressively incorporating innovative salary conditions, such as simplified salary structures and new formulas to put into practice annual salary increases based on the company financial situation and results, as

opposed to the traditional formula based on the official annual Consumer Price Index indicator and a certain additional percentage agreed to by the CBA.

In sum, an important transformation of CBAs is taking place in Spain and there is a move towards more rational labor relations that can be adapted by companies.

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Spain

Negotiating with representatives bodies in collective lay-offs or in procedures to substantially modify the employees' working conditions



According to Spanish legislation, when an employer implements a collective measure that will presumably substantially affect the employees' working conditions, or will imply their termination for redundancy, a formal proceeding must be fulfilled. The main requirement of this proceeding is to carry out a consultation period with the negotiating body that will represent the employees concerned. Taking this into consideration, the individuals who make up the negotiating body has been a very controversial issue have discussed in several judicial procedures (as the former Law did not accurately state the composition of, or the way the negotiating body needed to be designated). Moreover, several judgments have held that the process the employer followed to implement the measure was incorrect

due to the negotiation body not being properly constituted and therefore not representing those affected. Consequently, according to these judgments, the employer did not fulfill the requirement to carry out a consultation period, as the constitution of the negotiation body was not done correctly and therefore it did not have right to represent the employees concerned. As a result, the measure implemented by the Company was declared null and void. The Spanish Government tried to remedy this situation by approving a new Law which entered into force in August 2013.

The new Law modified the rules with regard to the composition and the way the employees are designated to negotiate in a consultation period. Additionally, it extended the time

required for the employer from the commencement of the procedure, until the effective implementation of the measure.

It is important to point out that while under the prior legislation the negotiation body was formed during the negotiation process, now it must be created before the start of the consultation period. Both the law that was in force prior to August 2013 and the current Law, state that the consultation period must last a maximum of 15 or 30 days (depending on the measure to be implemented by the employer and the number of employees affected). Therefore, prior to the labor reform of August 2013, the maximum time period needed for the employer from the commencement of the procedure until the implementation

of the measure was the 15 or 30 days of consultation period mentioned above (as the negotiation body was created during the consultation period). However, as previously indicated, this was changed in August 2013, and currently the employer cannot carry out the consultation period until the consultation body has been constituted. Therefore, if an employer wants to implement a collective measure, it must communicate the intention to start this collective measure prior to the start of the consultation period. Then, the employees concerned must constitute the negotiation body during the following seven days, (or 15 days, if there is a work center without employees' representatives). The employer can only start the consultation period once the employees concerned have constituted the negotiation body, or once the seven to 15 days have elapsed without the consultation body being determined.

On the other hand, the new procedure is more complex. The new regulation focuses on a unique negotiation body and removes the possibility of carrying out a separate consultation process in each affected work center. Furthermore, the new negotiating body must be integrated by a maximum of 13 members (if there are more than 13 workers' representatives taking into account the different work centers, they will choose the representatives of the negotiating body amongst themselves, in proportion to the total

number of employees of their work center). In addition, participation in the negotiations may be delegated to the trade unions when they have the majority of representatives in the Works Councils of the affected work centers, and as long as they agree to integrate the negotiation body.

Although the Government has tried to clarify the issues regarding the composition of the negotiation body, there are still a number of unsolved issues related to the new regulation. For example, the regulation states that each affected work center must be represented in the negotiating body in proportion to the number of employees of the work center. For example, what happens when there are 14 work centers affected by the measure that the employer is willing to implement? As we understand it, there are only two options: one is that one affected work center is not represented in the negotiation body, and the other is that the negotiation body is integrated by 14 employees. However, according to the wording of the law, none of these solutions seems possible.

Another scenario which has not been solved by the regulation is when there are several work centers affected by the measure, and only one of them is represented by a Works Council in which the unions have the majority of representatives, but the remaining affected work centers do not have employees' representatives. According

to the literal wording of the law, it seems that participation in the negotiations can be delegated to the trade unions. This assumes that there is only one work center with a Works Council and that as the remaining work centers do not have a Works Council, the unions have the majority of representatives in the Works Council of all the affected work centers. However, this interpretation can imply unfair treatment against some employees, as those employees from the work centers not represented by the Works Council would not be represented by the negotiating body.

Finally, it is important to bear in mind that the new regulation contains many difficulties in the procedure that cannot be easily solved. Moreover, these complications have not been addressed by Spanish case law. Considering that some judges have understood that an incorrect constitution of the negotiation body implies the nullity of the process implemented by the employer and therefore, the nullity of the measure, it is important for the employer to have an adequate clarification of the Law to implement the desired measure knowing that the process has been followed from a legal perspective.

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United States



Buyer Beware: NLRB targets successor issues in US mergers and acquisitions

The typical due diligence process in mergers and acquisitions involves a review of employment issues such as litigation, employment agreements, compensation arrangements, non-compete agreements and benefit plans. When a labor union represents the seller's workforce, another potential complication is present — will the post-acquisition entity constitute a successor? Under US labor law, an employer that purchases or otherwise acquires the operations of another employer may be obligated to recognize and bargain with the union that represented the employees before the acquisition. In recent months, unions have relied on successorship clauses in collective bargaining agreements to exercise greater control (or even veto power) over the sale of the business.

Most recently, the National Labor Relations Board's General Counsel announced that his office intends to step up oversight and enforcement of the National Labor Relations Act ("NLRA") when it comes to successor issues. In an April 30, 2014 memorandum, the General Counsel stated, "I have a particular interest in seeking injunctive relief in appropriate cases involving a successor's refusal to bargain and, more importantly, successor refusal-to-hire cases." According to the General Counsel, the union's relationship with employees is "particularly vulnerable to unfair labor practices" during a

transaction. "[U]nlawful conduct by a new employer that undermines the representative will lead to employee disaffection, concomitant loss of bargaining power, and loss of employee benefits" that cannot be restored by the normal NLRB procedure. In the General Counsel's view, swift action in the form of injunctive relief in federal court is necessary to protect the relationship. Accordingly, it is critical for companies to consider labor issues in acquisitions, including the question of successorship, to minimize labor risk and fully realize the value of the transaction.

Successor Issues and Deal Structure

Labor issues can impact the seller's and buyer's strategy in structuring, negotiating and closing the acquisition (and even whether the deal gets done at all). The buyer's labor obligations are determined by the deal structure. If the transaction is a stock or share sale, the purchaser generally is considered the "successor" and assumes all of the target business's labor-related liabilities and obligations, including the union relationship and applicable collective bargaining agreement. This is because there is such continuity of operations and employment that there is no real change in the employing enterprise.

In contrast, in an asset sale, the transfer of labor liabilities and obligations is not a certainty. Rather, whether the buyer

is a "successor" depends on several factors, including the continuity of the workforce and business operations and the nature of the bargaining relationship and agreement between the union and the original employer. In an asset sale, all employees are considered terminated as of the closing date and may be rehired by the new entity. When it comes to assessing the continuity of the workforce, numbers matter. Assuming the buyer rehires some of the seller's employees into the same "bargaining unit" the union represented before closing, the test is simple: if a majority of the resulting workforce in the bargaining unit following the transaction was previously represented by the union, the union will still represent the employees in the new bargaining unit and the buyer will be a "successor."

Significantly, in an asset purchase, the buyer need not assume the seller's collective bargaining agreement, but can instead set its own terms and conditions of employment. If, however, the buyer is a "perfectly clear" successor, the buyer is required to bargain with the union regarding its initial terms and conditions of employment. This may happen if, for example, the buyer announces that it will hire the majority of the seller's workforce and operate largely on the same terms as the seller.

Avoiding Unfair Labor Practices in a Transaction

The labor obligations of the buyer in a stock sale are relatively simple: the employer must treat the union as the representative for its covered employees and abide by the terms of the collective bargaining agreement. When the collective bargaining agreement expires, the successor must bargain with the union to reach a new agreement. Any decision to close the facility following the sale cannot be made on the basis of union representation.

Most unfair labor practice charges arise in the context of asset sales. The first is “refusal to hire.” Because continuity is in part a numbers exercise, a purchaser intent on avoiding the union may try to hire from outside of the existing workforce to prevent successor status. For example, if 100 employees were in a bargaining unit, the purchaser could hire 40 of those employees after closing and another 60 employees from other sources to try and avoid the immediate obligation to recognize and bargain with the union. The NLRA, however, prohibits discrimination based on union affiliation or preferences. Accordingly, the buyer should ensure knowledgeable human resources professionals and/or counsel carefully scrutinize hiring decisions during and following a transaction. If the buyer plans to consider a substantial complement of applicants from other sources, it should have demonstrably good reasons for choosing those applicants over the seller’s employees.

Another common unfair labor practice charge in an asset sale is “refusal-to-recognize.” The successor might refuse to recognize the union (even if it rehires a majority of employees in the bargaining unit) and allow the traditional NLRB administrative process to complete itself. While some employers have followed this course to delay bargaining and undermine support for the union, an employer violates the NLRA if it refuses to recognize a majority union. While this strategy may have worked in the past with minimal consequences to the employer, the NLRB’s decision to target successor issues means that similar attempts are likely to be met with immediate injunctive litigation. This can result in substantial legal costs to the employer and the likelihood of an unfavorable injunction being granted. Thus, employers should only refuse to recognize the union if there is a legitimate dispute as to whether a majority exists.

Practical Implications

The NLRB will more aggressively scrutinize and litigate situations following a transaction where a purchaser attempts to discard a union relationship along with the transaction or discriminate against union members in hiring. Employers can reduce the risk of labor litigation with proper workforce planning during the pre-closing phase of the transaction. To minimize the risk of injunctive litigation

from the NLRB following closing, the buyer should review the following issues with counsel:

- the size of the post-closing workforce (*i.e.*, Is the entire pre-closing workforce needed or are operations being consolidated or eliminated?);
- the hiring process for post-closing workforce, including sources and non-discriminatory hiring criteria;
- the communications process with the union, pre-closing employees and other applicants; and
- the expected and actual numerical complement of employees from the former bargaining unit and outside sources and analysis of resulting successorship obligations.

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