

## LatAm lawyers discuss potential FCPA pitfalls

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Legal representatives from Argentina, Brazil, Chile, Colombia and Peru were recently brought together to discuss the impact of the US Foreign Corrupt Practices Act (FCPA) on multinational companies operating within Latin America, where the differences in transparency legislation between the five countries, the best methods for companies to implement an effective anti-corruption policy and what protections are available to whistle blowers were all discussed.

The online webinar, which was organised by Argentine firm Beretta Godoy, took place on 13 September and featured representatives from some of the region's leading law firms: Brazilian firm [Veirano Advogados](#), [Cariola, Díez, Pérez-Cotapos & Cía Ltda](#) in Chile, [Brigard & Urrutia Abogados](#) in Colombia and [Rodrigo, Elías & Medrano Abogados](#) in Peru.

In Chile, where transparency compliance is overseen by the labour agency, the best way for companies to implement an effective anti-corruption policy is by developing their own internal practices, said Cariola Díez partner Ricardo Tisi, who also noted that these have to abide with key requirements laid out under Chilean law. For example, internal rules should not conflict with the constitutional rights afforded to employees, that any company exceeding 10 employees should set out transparency provisions in its internal work rules and that policy actions must be proportional to the aimed purpose of the policy.

Cariola Díez labour associate Verónica García Huidobro looked at the practical application of FCPA rules in Chile – such as the use of the company email, namely whether sent or received content is public or private, and the various actions that can be taken by the employer to monitor employees' internet use. García outlined actions that need to be taken by an employer before they are able to collect information for use during any subsequent legal action, pointing out that “it is essential that the monitoring of the internet use is respectful of the personal skill of the employee and does not conflict with the constitutional rights recognised by Chilean law.”

Brigard & Urrutia associate Jorge Valencia Mora discussed how to secure legal tools for the investigation of corruption, and looked at the differences in transparency laws between Colombia, Peru and Chile, particularly how to implement of transparency policies in line with local rules, such as those rules concerning the monitoring of employee email and internet use .

Rodrigo Elías partner Mario Pasco Lizárraga looked at employee whistleblowing: the duty to communicate and the protections afforded to whistle blowers within an organisation after they expose corruption.

“The situation can get very complicated for the whistle blower as the individual involved [engaging in corrupt practices] is often a fellow worker, friend or superior,” said Pasco noting that the situation could become further complicated if the whistle blower him or herself is involved fully or in part in the action being reported.

Pasco referred to the “several shades of grey” in rules governing the protection afforded to whistle blowers across Latin America, contrasting provisions in Argentina, Brazil, Chile and Peru, where there is no direct obligation to report corrupt practices, with those in Colombia which imposes a duty to communicate these practices to the authorities. With potential penalties for employers and employees knowingly failing to report corruption also differing between the countries, Pasco advised that the best option for a multinational working in these countries was to develop clear internal rules in-line with the local legislation.

For the whistle blower the main question is “Will I be seen as a hero in the fight against corruption, or will I be harassed as a traitor by fellow employees and the company,” said Pasco.

Pasco thinks the key to tipping the balance in favour of reporting corruption is for multinationals to establish ways for workers to speak about corruption anonymously.

Once a corrupt act has been uncovered, the next step depends on the country it took place in. As Beretta Godoy partner Mercedes Balado notes, “In many countries employers do not need to report a corrupt act to the authorities, however, in Colombia it is a constitutional right for the employers to cooperate with the authorities and the individual has to report. “In Chile, reporting corruption helps to diminish individual liability, but this does not mean they are off the hook.”

Beretta Godoy’s Sebastian Nordemann said the issue also comes down to the balance between the seriousness of the offence and the conclusiveness of the evidence. “In the case of Peru, the employer does not need a court of justice to determine the grounds of the alleged violation in terms of FCPA to be entitled to terminate employment as long as the actions of the employee violated good faith of the employer or were contrary to policy,” he noted. “In Brazil and Colombia this is similar. The employer does not have to wait for a decision to terminate as long as the employer can provide evidence that the crime has taken place in the work place or is a breach of work duties.”

By contrast the “very protective labour regimes” of Argentina and Chile means that conclusiveness to terminate the contract of employee is much higher, Nordemann added, which means the seriousness of the alleged misconduct often has to be much higher to reach prosecution.

Veirano Advogados partner João Geraldo Piquet Carneiro discussing the availability of FCPA's affirmative defences in Latin America and the key aspects to take into account in lobbying and promotional activities.

Pointing to a legislative "empty space" in Brazil's regulations, Carneiro noted that the country is expecting new corruption legislation to be passed next year that would tighten rules by defining the responsibility of the legal entity independent from the responsibility of managers and directors of a company. Alongside this, would be a rule outlining the responsibilities of the directors and anyone that is involved in the corruption incident in the company. "The new law is going to be very superior," he predicted.

Carneiro explained that while Brazil doesn't have any laws concerning lobbying, rules did exist to protect federal officers from pressure from irregular lobbying, which he defined as being closer to pushing than consultation.

"In Brazil's federal government, gifts are not allowed unless it's emotional, such as souvenirs," Carneiro explained. "A second provision is that anyone who wants to discuss an issue of particular interest to a company or sector, the officer will have to be accompanied by an officer of the same office." But he added that while the rules were strict in relation to federal officers, rules governing Congress were different as "restrictions on lobbying would be a restriction on access by civil society and conflict with the idea of congress as a house of the people."

For Carneiro, the best approach for multinationals to avoid the pitfalls of hiring a lobbyist is to do their homework, by always ensuring they have a good profile and excellent CV.